TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. 170.

JAMES FARRELL, PLAINTIFF IN ERROR,

vs.

JAMES M. LOCKHART, ADMINISTRATOR OF THE ESTATE OF JOHN G. RHODIN, DECEASED.

IN ERROR TO THE SUPREME COURT OF THE STATE OF UTAH.

FILED DECEMBER 14, 1906.

(20,485.)

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1 In the Supreme Court of the United States.

JAMES FARRELL, Plaintiff in Error,
v.
JAMES M. LOCKHART, Administrator of the Estate of John G. Rhodin, Deceased, Defendant in Error.

2 In the Supreme Court of the State of Utah.

JAMES M. LOCKHART, Administrator of the Estate of John G. Rhodin, Deceased, Appellant,
v.
JAMES FARRELL, Respondent.

Specification of Error.

Now comes the plaintiff and appellant above named and assigns the following error, which he alleges was committed by the judge of the trial court, and upon which he relies for a reversal of this cause, to-wit:

The court erred in entering its decree herein in favor of defendant and against plaintiff, awarding defendant the conflict area in dispute for the reason that the said decree and judgment are not supported by the findings of fact adopted by the court based upon the evidence introduced at the trial, in the following particulars especially:

The court finds as a fact (Finding No. 3 and 8, Tr. pp. 27, 29) that the location by defendant, respondent, of the Cliff claim was made when the ground embraced within the boundaries thereof, and the portion upon which the discovery of said Cliff claim was attempted to be placed, was covered by a valid and subsisting
3 location, to-wit, the South Mountain; the said South Mountain having been located in 1900 and the said Cliff having been attempted to be located, and its discovery placed within the boundaries of the South Mountain as aforesaid, in the year 1901, before there had been any abandonment or forfeiture of said South Mountain for non-performance of assessment work; the court further finds that the said Divide claim was located in 1902 by plaintiff's intestate, who also acquired the title to said South Mountain, which covered the same ground, the title to which the latter was permitted to lapse for nonperformance of assessment work. Upon the facts as thus found the court erroneously adopts the conclusion of law that defendant, having the older location, as between the Cliff and Divide, is entitled to the area in conflict, regardless of the fact that his discovery was placed upon a then valid and subsisting claim.

SNYDER & SNYDER,
Attorneys for Appellant.

Filed Jan. 22, 1906.
H. W. GRIFFITH,
Clerk Supreme Court, Utah.
1—170

4 In the Supreme Court of the State of Utah.

JAMES M. LOCKHART, Administrator of the Estate of John G. Rhodin, Deceased, Appellant,
v.
JAMES FARRELL, Respondent.

Transcript on Appeal.

Snyder & Snyder, Attorneys for Appellant.
Dey & Stevens, Attorneys for Respondent.

5 In the Third Judicial District Court of Utah in and for Summit County.

JAMES M. LOCKHART, Administrator of the Estate of John G. Rhodin, Deceased, Plaintiff,
v.
JAMES FARRELL, Defendant.

Divide.

Complaint.

Plaintiff complains and alleges:

I. That he is, and at all times hereinafter mentioned was a native born citizen of the United States.

That on the 21st day of March, 1905, John G. Rhodin died intestate and that on the 3rd day of April, 1905, this plaintiff was duly and regularly appointed administrator of the estate of said John G. Rhodin, deceased, that he immediately and on the same day, duly qualified as such by taking the oath and filing the bond required by law, and ever since has been and now is the qualified and acting administrator of said estate, and brings this suit as such administrator.

II. That on and since the 2nd day of January, 1903, plaintiff through his predecessor and grantor, was, ever since has been, and now is the owner (subject to the paramount title of the United States) and in possession and entitled to the possession, by virtue of the discovery of mineral thereon and location thereof according to law, made on said 2nd day of January, 1903, and by duly marking the boundaries thereof and performing all the acts required by law and the rules and regulations of the Uintah Mining District, Summit County, Utah, of that certain lode mining claim
6 known as the Divide, situate in said Uintah Mining District and more particularly described as follows, to-wit:

Commencing at corner No. 1 of the Divide from which post No. 4 of the Summit claim patented lot 329 bears S. 32 Deg. 19 min. E. 113.8 ft. distant; thence S. 74 deg. 30 min. W. 569.9 ft. to corner No. 2; thence S. 74 Deg. 33 min. E. 101.1 feet to corner No. 3;

thence S. 28 deg. 18 min. E. 887.2 feet to corner No. *No.* 4; thence N. 74 deg. 30 min. E. 388.4 feet to corner No. 5; thence N. 26 deg. 24 min. W. 940.9 feet to place of beginning.

III. That since the location of said Divide, as aforesaid, plaintiff with his predecessor and grantor have done and performed not less than $100 worth of labor and improvements upon said claim during each and every year for the development of said claim, and has performed each and every act required by law, for the purpose of holding said claim.

IV. That defendant, claiming to be the owner of a certain adjacent mining claim, known as the cliff, did, on or about the 17th day of October, 1904, cause said alleged mining claim to be so surveyed as to cross upon and overlap said Divide mining claim, the property of this plaintiff, and to include the portion thereof described as follows, to-wit:

Beginning at Cor. No. 1 of the Cliff lode, U. S. Survey No. 5312, thence on true course N. 26 deg. 51 Min. W. 478.4 feet to corner No. 1 of the Wedge lode, Lot 159, identical with corner 2 of the Lucky John lode (amended) lot 156; thence N. 33 deg. 56 min. W. 123.7 feet to a point of intersection of the west side line of the Divide Lode with the east end line of said Lucky John lode; thence N. 28 deg. 18 min. W. 53.3 feet to a point of intersection of the west side line of the Cliff lode with the south side line of the Ottumwa lode, Lot 716; thence N. 74 deg. 30 min. E. along the north end line of the Divide lode, 308.5 feet to Cor. No. 6 of the Fraction lode, Lot 713; on the south side line of the said Ottumwa lode and north end line of the divide lode; thence S. 52 deg. 40 min. E. 211.10 feet to a point of intersection of the west end line of said Fraction lode with the west end line of the Summit lode, Lot 329; thence S. 1 deg. 00 min. W. 139.5 feet to corner No. 1 of the said Summit lode; thence S. 89 deg. 00 min. E. 68.8 feet to corner No. 8 of the U. S. lode, lot 715; thence S. 30 deg. 45 min. E. 212.2 feet to a point of intersection of the west end line of said U. S. lode with the east side line of the Divide lode; thence S. 26 deg. 04 min. E. 251.2 — to a point on the east side line of the Divide lode, on the east side line of the Cliff lode aforesaid, and on the north side line of the Maud H. lode, lot 585, bearing north 26 deg. 04 min. W. 4.7 feet from cor. No. 5 of the Divide and Cor. No. 4 of the Cliff lode; thence
7 N. 87 deg. 41 min. W. 440.4 feet to the place of beginning. Containing 6,038 acres, more or less.

V.

That on or about the 1st day of February, 1905, defendant filed the field notes and diagram of said survey of said alleged Cliff, together with an application for a United States patent for said mining claim, in the United States Land Office at Salt Lake city, Utah, and caused the Register of said Land Office to give notice of said application for patent in the manner prescribed by law. That in and by said application for patent defendant wrongfully set up and alleged that he was and is the owner and in possession and entitled to the possession of the whole of said alleged Cliff mining

claim, including the premises last above described, and the lodes therein, being the whole of said Divide claim, the property and in possession of this plaintiff.

VI.

That the plaintiff, on or about the 3rd day of April, 1905, and during the sixty days' period of publication of the notice of application for patent for said alleged Cliff claim, filed in said Land Office, under oath, a protest and adverse claim to said application for patent, showing the nature, boundaries and extent of the adverse claim of this plaintiff. That thereupon proceedings in said Land Office upon said application for patent were and are stayed to await the determination by a court of competent jurisdiction of the right of possession of said last described premises and the rights of the respective parties therein and thereto; and to that end plaintiff brings this suit, the period of thirty days not yet having elapsed since the filing of said protest and adverse claim.

VII.

That defendant maintains and prosecutes said application
8 for patent for said alleged Cliff claim, and that thereby the title of this plaintiff in and to said last described premises, being the area thus brought in conflict between said Divide and said alleged Cliff, is wrongfully impeached, clouded and encumbered and the value of plaintiff's estate and property therein depreciated to his great damage.

Therefore, plaintiff prays judgment against the defendant for a decree of this court decreeing that plaintiff is the owner and lawfully in the possession and entitled to the possession of said last described area in conflict and the lodes therein, and confirming plaintiff's title thereto and possession thereof. That defendant be restrained during the pendency of this action, and upon trial perpetually, from entering upon said described area in conflict, or the lodes therein, or any part thereof, and from in any way interfering with the plaintiff's possession thereof.

Finally plaintiff prays for general relief and for his costs in this action.

SNYDER & SNYDER,
Attorney for Plaintiff.

STATE OF UTAH, *County of Salt Lake, ss:*

W. I. Snyder being first duly sworn deposes and says:

I am one of the attorneys for the plaintiff herein and verify this complaint because the said plaintiff is absent from Salt Lake County where I reside. I have read the foregoing complaint, and the same is true according to my best knowledge, information and belief.

W. I. SNYDER.

Subscribed and sworn to before me this 2nd day of May, 1905.

BISMARK SNYDER,
Notary Public.

9 In the Third Judicial District Court of Utah in and for Summit County.

JAMES M. LOCKHART, Administrator of the Estate of John G. Rhodin, Deceased, Plaintiff,
vs.
JAMES FARRELL, Defendant.

Summons.

The State of Utah to the said defendant:

You are hereby summoned to appear within twenty days after the service of this summons upon you, if served within the county in which this action is brought, otherwise within thirty days after service, and defend the above entitled action; and in case of your failure so to do, judgment will be rendered against you according to the demand of the complaint of which a copy is herewith served upon you.

SNYDER & SNYDER,
Attorneys for Plaintiff.

P. O. Address: 227 Atlas Block, Salt Lake City, Utah.

10 *Sheriff's Return.*

STATE OF UTAH, *County of Salt Lake, ss:*

I hereby certify that I received the within and hereunto annexed summons on the 2nd day of May, 1905, and served the same upon James Farrell, the within named defendant, by delivering to and leaving with Lila Farrell, a suitable person over the age of 14 years at the usual place of abode of said defendant, in the City and County of Salt Lake, State of Utah, on the 2nd day of May, A. D. 1905, a true copy of said summons attached to a copy of the complaint referred to in said summons.

I further certify that at the time of service of summons on the defendant, as aforesaid, I endorsed on the copy of the summons, so served, the date and place of service, signed my name and added my official title thereto.

Dated at Salt Lake City, this 3rd day of May, A. D. 1905.

C. FRANK EMERY,
Sheriff of Salt Lake County, State of Utah.
By T. L. IRVINE,
Deputy Sheriff.

11 In the District Court of the Third Judicial District of the State of Utah, County of Summit.

JAMES M. LOCKHART, Administrator of the Estate of John G. Rhodin, Deceased, Plaintiff,

v.

JAMES FARRELL, Defendant.

"Divide *v.* Cliff.

Answer.

Now comes the above named defendant, and for answer to the complaint of the plaintiff herein admits, denies and alleges as follows:

This defendant admits the allegations of paragraph one of said complaint.

Defendant denies each and all of the allegations contained in paragraphs 2 and 3 of said complaint.

Defendant admits the allegations contained in paragraph 4 of said complaint, and also of the allegations of paragraph 5 of said complaint, except wherein it is alleged that this defendant wrongfully set up and alleged that he was the owner and in the possession and entitled to the possession of the whole of said Cliff mining claim, including the premises described in said complaint; on the contrary, defendant alleges that he rightfully made said claim, and denies that he did it wrongfully.

Defendant denies upon information and belief each and all of the allegations, matters and things contained in paragraphs 6 and 7 of said complaint.

12 And for a further and separate answer and defense to said complaint, and by way of affirmative relief, this defendant alleges that he is now, and at all the times hereinafter mentioned has been, a citizen of the United States, and that ever since the 1st day of August, 1901, this defendant has been and still is the owner, subject only to the paramount title of the United States, and in the possession and entitled to the possession of the whole and every part of the Cliff lode mining claim, being mineral survey No. 5312 of the official surveys of and within the Uintah Mining District, Summit County, State of Utah, particularly described with magnetic variation at 16 degrees .05 minutes to 17 degrees .09 minutes east, as follows, to-wit:

Commencing at post No. 1, a corner of the claim, from which the southeast corner of Section 25, Township 2 South, Range 3 East, Salt Lake Base and Meridian, bears south 42 deg. 59 min. east 617.6 feet; thence running from said corner No. 1 north 28 deg. 18 min. west 807.9 feet to corner No. 2; thence south 87 deg. .09 min. east 478.6 feet to corner No. 3; thence south 26 deg. .04 min. east 789.8 feet to corner No. 4; thence north 87 deg. .09 min. west 442.6 feet to corner No. 1, being the place of beginning. Said claim being located in the southeast quarter of Section 25, Township 2 South,

Range 3 East, and the southwest quarter of Section 30, Township 2 South, Range 4 East, Salt Lake Base and Meridian, and containing a total area of 7.310 acres; excluding, however, therefrom the area in conflict with the Maud H., Lot 585; Wedge, Lot 159; Lucky John, Lot 156; Ottumwa, Lot 716; Fraction, Lot 713; Summit, Lot 329, and U. S., Lot 715—such excluded area containing 1,272 acres. Net area claimed and applied for being 6.038 acres.

13 That the premises referred to and particularly described in the complaint as the alleged conflict area, have, ever since the location of said Cliff lode mining claim, constituted and do now constitute, part and parcel thereof as hereinbefore described, and belonging thereto and to the defendant as the owner of said Cliff lode mining claim.

That the plaintiff has no right, title or interest in or to the Cliff lode mining claim, or any part thereof, or of, in or to the part described in the comp'aint, and that plaintiff's alleged adverse claim is wrongful and without right.

Wherefore, defendant prays judgment that the plaintiff take nothing, and that the defendant be decreed to be the owner and entitled to the possession of the Cliff lode mining claim, including the premises set forth in the complaint as the alleged conflict area. That the plaintiff be adjudged to have no right, title or interest in and to the said or any part of said premises described in the complaint as the alleged conflict area. That the defendant's right and title be forever quieted and confirmed as against the plaintiff and all persons claiming under it, and that they and each of them, and all persons claiming under them be forever estopped and barred from at any time hereafter setting up any right or title to said or any part of said premises; also for all equitable and proper relief, and for costs of suit.

DEY & STEVENS,
Attorneys for Defendant.

STATE OF UTAH, *County of Salt Lake, ss:*

James Farrell being first duly sworn deposes and says: That he is the defendant named in the above entitled action; that he has read the above and foregoing answer, knows the contents thereof,

14 and that the same is true, except as to matters therein stated upon information and belief, and as to those matters he believes it to be true.

JAMES FARRELL.

Subscribed and sworn to before me this 7th day of June, 1905.

C. W. L. STEVENS,
[SEAL.] *Notary Public.*

15 In the Third Judicial District Court for the State of Utah in and for Summit County.

JAMES M. LOCKHART, Administrator of the Estate of John G. Rhodin, Deceased, Plaintiff,
vs.
JAMES FARRELL, Defendant.

Divide *v.* Cliff.

Reply.

The plaintiff in the above entitled action files this his reply to the affirmative matter pleaded in defendant's answer herein, and

1. Admits that defendant is a citizen of the United States as therein alleged.

2. Denies each and every allegation contained therein.

Wherefore plaintiff prays judgment according to the demand of his original complaint on file herein.

SNYDER & SNYDER,
Attorneys for Plaintiff.

STATE OF UTAH, *County of Summit, ss:*

James M. Lockhart being first duly sworn deposes and says: I am the plaintiff in the above entitled action, have read the foregoing reply, and the same is true of my own knowledge.

JAMES M. LOCKHART.

Subscribed and sworn to before me this 10th day of June, 1905.
[SEAL.] W. CALDERWOOD,
Clerk of 3rd District Court.

Service by copy accepted this 10th day of June, 1905.
DEY & STEVENS.

16 In the Third Judicial District Court of Utah in and for Summit County.

JAMES M. LOCKHART, Administrator of the Estate of John G. Rhodin, Deceased, Plaintiff,
v.
JAMES FARRELL, Defendant.

Divide *v.* Cliff.

Stipulation.

It is hereby stipulated by the parties above named that the above entitled action may be transferred from Summit County to Salt Lake

County, and that an order may be made by any of the judges of this court so transferring it, or that the evidence be heard in Salt Lake County without transfer, and judgment entered at Coalville.

Dated this 11th day of November, 1905.

SNYDER & SNYDER,
Attorneys for Plaintiff.
DEY & STEVENS,
Attorneys for Defendant.

Order.

Pursuant to the foregoing stipulation, it is by the undersigned, one of the judges of said court,

Ordered that the above entitled action be, and the same is hereby transferred from Summit County to Salt Lake County. The clerk of Summit County will transmit all papers and files in the above entitled action to the Clerk of Salt Lake County.

—— ——, *Judge.*

Dated this 13th day of November, 1905.

17 In the District Court of the Third Judicial District of the State of Utah, County of Summit.

JAMES M. LOCKHART, Administrator of the Estate of John G. Rhodin, Deceased, Plaintiff,
v.
JAMES FARRELL, Defendant.

Findings of Fact and Conclusions of Law.

This cause having come on regularly to be tried before said court, Honorable T. D. Lewis, Judge presiding, on the 20th day of November, 1905, the plaintiff appearing by W. I. Snyder, his attorney, and the defendant by Charles C. Dey, his attorney, and the court having heard the proof of the respective parties, and considering the same, and the records and papers in said cause, and the arguments of the respective attorneys thereon, and the cause having been submitted to the court for its decision, the court now finds the following facts:

Findings of Fact.

1. That the plaintiff and the defendant are, and at all times herein mentioned were, citizens of the United States, and that plaintiff's intestate, John G. Rhodin, was a citizen of the United States.

2. That the said defendant, James Farrell, is now, and ever since the first day of August, 1901 has been, the owner (subject only to the paramount title of the United States) in the possession, and entitled to the possession of the Cliff lode mining claim, situate
18 in the Uintah Mining District, County of Summit, State of Utah.

3. That said James Farrell, the locator of said Cliff lode mining claim, at the time of the location of said claim, to-wit on the 1st day of August, 1901, discovered a mineral bearing vein or lode within the limits of said claim, and on said day posted a written notice of location at the discovery point within said claim. Said notice described said claim by reference to permanent monuments and natural objects, so it could be identified, and also contained the name of the locator, the date of location, and the name of said claim. Thereupon said defendant sufficiently marked on the ground the boundaries of said mining claim, by setting stakes at the corners of said claim, and marked the stakes to identify them with reference to the claim, and thereupon duly caused said notice of location to be recorded in the office of the County Recorder of Summit County, Utah.

4. That said defendant has in each year since said location done work and made improvements on said mining claim of the value of more than $100.00 including the year 1905.

5. That after the location of said Cliff lode mining claim, and on or about the 2nd day of January, 1903, said John G. Rhodin discovered a lode of rock in place, bearing silver and other metals, within the boundaries of said Cliff mining claim, and located the said Divide lode mining claim, and properly marked the same on the ground so that its boundaries could be readily traced; posted a notice of location at the discovery point, and duly recorded said notice in the office of the County Recorder of said Summit County, Utah, which said notice contained the name of the locator, the name of the location, and such a description of the claim located, with
19 reference to natural objects and permanent monuments as to identify the same.

6. Since the location of said Divide lode mining claim the said plaintiff and his intestate, during his lifetime, annually performed at least $100.00 worth of labor and improvements upon said claim, up to and including the year 1905.

7. That on or about the 17th day of October, 1904, said James Farrell caused said Cliff lode mining claim to be surveyed for United States patent, and thereafter, on the 1st day of February, 1905, said defendant duly applied for patent for said claim, by filing his application for a United States patent in the United States Land Office at Salt Lake City, Utah, and caused notice thereof to be duly published as provided by law. That during the period of publication, said plaintiff, on or about the 3rd day of April, 1905, duly filed an adverse claim in said United States Land Office, to the application of said plaintiff, for a portion of said Divide lode mining claim that conflicts with said Cliff lode mining claim, as more particularly described in the complaint herein, and that thereupon and within the time allowed by law, said plaintiff brought this suit, on the 2nd day of May, 1905, in support of said adverse claim.

8. That upon the trial of said action plaintiff offered evidence (subject to the objection of the defendant that the same was incompetent, immaterial and irrelevant, and that no adverse claim was filed on behalf of the South Mountain lode mining claim) tending to

show that during the month of August, 1900, the ground in contro-
versy herein was located by W. I. Snyder and Thomas Ros-
20 camp, respectively, citizens of the United States, under the
name of the South Mountain lode mining claim. That a discovery of a vein was made, and notice of location posted, and the boundaries of said claim marked so that the same could readily be traced, and that said notice was in due form and was duly recorded in the office of the County Recorder of Summit County, State of Utah. That no work was ever done upon said South Mountain claim, and that said South Mountain claim lapsed and became forfeited for want of work done thereon, on December 31, 1901. That no adverse claim was filed on behalf of said South Mountain lode against the application for patent for said Cliff lode mining claim That on or about the 13th day of October, 1902, said Snyder and Roscamp made a deed purporting to convey said alleged South Mountain lode mining claim to said John G. Rhodin.

9. That the said Cliff, Divide and South Mountain claims, as located, cover substantially the same ground, and that the place of discovery of said Cliff lode mining claim was within the boundaries of said alleged South mountain mining claim.

10. That the plaintiff has no right, title or interest of, in or to the Cliff lode mining claim, more particularly described in the answer of the defendant herein, or any part thereof, or of, in or to the part thereof described in the complaint herein as being in conflict with said Divide lode mining claim, and that the adverse claim of said plaintiff is wrongful and without right. That said conflict area is particularly described as follows, to-wit:

Beginning at cor. No. 1 of the Cliff lode, U. S. Survey No. 5312, thence on true courses N. 26 deg. 51 min. W. 478.4 feet to corner No. 1 of the Wedge lode, lot 159, identical with cor. 2 of the Lucky
John lode (amended) lot 156; thence N. 33 deg. 56 min. W.
21 123.7 feet to a point of intersection of the west side line of the Divide lode with the east end line of said Lucky John lode; thence N. 28 deg. 18 min. W. 53.3 feet to a point of intersection of the west side line of the Cliff lode with the south side line of the Ottumwa lode, lot 716; thence N. 74 deg. 30 min. E. along the north end line of the Divide lode, 308.5 feet to cor. No. 6 of the Fraction lode, lot 713; on the south side line of the said Ottumwa lode and the north end line of the Divide lode; thence S. 52 deg. 40 min. E. 211.10 feet to a point of intersection of the west end line of said Fraction lode with the west end line of the Summit lode, lot 329; thence S. 1 deg. 00 min. W. 139.5 feet to corner No. 1 of said Summit lode, lot 329; thence S. 89 deg. 00 min. E. 68.8 feet to cor. No. 8 of the U. S. lode, lot 715; thence S. 30 deg. 45 min. E. 212.2 feet to a point of intersection of the west end line of said U. S. lode with the east side line of the Divide lode; thence S. 26 deg. .04 min. E. 251.2 feet to a point on the east side line of the Divide lode on the east side line of the Cliff lode aforesaid, and on the north side line of the Maud H. lode, lot 585, bearing N. 26 deg. .04 min. W. 4.7 feet from cor. No. 5 of the Divide and cor. No. 4 of the Cliff

lode; thence N. 87 deg. 41 min. W. 440.4 feet to the place of beginning. Containing 6.038 acres, more or less.

Conclusions of Law.

1. That the defendant, at the time of the commencement of this action, was the owner and in the possession of the mining claim called the Cliff, which was then, and still is, a valid mining claim, embracing and including the premises specifically described
22 in the findings of fact herein (subject only to the paramount title of the United States).

2. That the plaintiff has no right, title or interest in said premises, or any part thereof, and had none at the — this action was commenced.

3. That the defendant is entitled to a judgment or decree declaring, confirming and quieting his title to said Cliff lode mining claim and said premises described in the complaint and findings of fact herein, and specifically described as the area in conflict; and that the plaintiff has no right, title or interest in said premises, or any part thereof, and for costs.

Dated December 19, 1905.

By the Court,

T. D. LEWIS, *Judge.*

23 In the District Court of the Third Judicial District of the State of Utah, County of Summit.

JAMES M. LOCKHART, Administrator of the Estate of John G. Rhodin, Deceased, Plaintiff,

v.

JAMES FARRELL, Defendant.

Decree.

This cause having heretofore been brought on for trial before the court, plaintiff herein appearing by W. D. Snyder and the defendant herein appearing by Charles C. Dey, and the court having heretofore rendered its decision, and having filed its findings of facts and conclusions of law:

Now therefore, upon motion of Dey & Stevens, attorneys for defendant, it is hereby ordered, adjudged and decreed, that the plaintiff herein take nothing by his said action.

It is further ordered, adjudged, and decreed, that the defendant, James Farrell, is the owner, in possession, and entitled to the possession, except as against the paramount title of the United States, of all those premises situated in the Uintah Mining District, Summit County, State of Utah, known as the Cliff lode mining claim, more particularly described in the answer of the defendant herein, including all and every part of the conflict area described in said findings of fact and in the complaint herein, as follows, to-wit:

24 Beginning at Cor. No. 1 of the Cliff lode, U. S. Survey No. 5312, thence on true courses N. 26 deg. 51 min. W. 478.4 feet to corner No. 1 of the Wedge lode, lot 159, identical with cor. 2 of the Lucky John lode (amended) lot 156; thence N. 33 deg. 56 min. W. 123.7 feet to a point of intersection of the west side line of the Divide lode with the east end line of said Lucky John lode; thence N. 28 deg. 18 min. W. 53.3 feet to a point of intersection of the west side line of the Cliff lode with the south side line of the Ottumwa lode, lot 716; thence N. 74 deg. 30 min. E. along the north end line of the Divide lode, 308.5 feet to cor. No. 6 of the Fraction lode, lot 713; on the south side line of the said Ottumwa lode and north end line of the Divide lode; thence S. 52 deg. 40 min. E. 211.10 feet to a point of intersection of the west end line of said Fraction lode with the west end line of the Summit lode, lot 329; thence S. 1 deg. 00 min. W. 139.5 feet to corner No. 1 of the said Summit lode, lot 329; thence S. 89 deg. 00 min. 68.8 feet to cor. No. 8 of the U. S. lode, lot 715; thence S. 30 deg. 45 min. E. 212.2 feet to a point of intersection of the west end line of the said U. S. lode with the east side line of the Divide lode; thence; *thence* S. 26 deg. .04 min. E. 251.2 feet to a point on the east side line of said Divide lode, on the east side line of the Cliff lode aforesaid, and on the north side line of the Maud H. lode, lot 585, bearing N. 26 deg. 04 min. W. 4.7 feet from cor. No. 5 of the Divide and cor. No. 4 of the Cliff lode; thence N. 87 deg. 41 min. W. 440.4 feet to the place of beginning Containing 6.038 acres more or less.

It is further ordered, adjudged, and decreed that the plaintiff has no right, title or interest in said premises, or any part thereof, and had none at the time of the commencement of the action.

25 It is further ordered, adjudged, and decreed, that the title of said defendant in and to said premises, and each and every part thereof, is hereby quieted and confirmed as against the plaintiff, and against all persons whomsoever.

It is further ordered, adjudged, and decreed that the defendant, James Farrell, do have and recover from the plaintiff his costs herein taxed at the sum of $13.20.

Dated December 19, 1905.

By the court, T. D. LEWIS, *Judge*.

26 In the District Court of the State of Utah in and for the County of Summit.

JAMES M. LOCKHART, Administrator of the Estate of John G. Rhodin, Plaintiff,

vs.

JAMES FARRELL, Defendant.

Divide *vs.* Cliff.

Bill of Exceptions.

Be it remembered, that this action was commenced by filing a complaint and serving the summons; that issue was joined by answer and a reply was made thereto, and the issues thus made up were tried before Honorable T. D. Lewis, at Coalville, Summit County, Utah, without the intervention of a jury; and that thereafter in due time, findings of fact, conclusions of law and decree were made, signed and filed by the court and constitute in full the record and bill of exceptions herein.

The complaint was and is as follows:

(Title of the Court and Cause.)

Complaint.

Plaintiff complains and alleges:

I.

That he is, and at all times hereinafter mentioned was a native born citizen of the United States.

That on the 21st day of March, 1905, John G. Rhodin died intestate and that on the 3rd day of April, 1905 this plaintiff was duly and regularly appointed administrator of the estate of said John G. Rhodin, deceased, that he immediately and on the same day, duly qualified as such by taking the oath and filing the bond required by law and ever since has been and now is the qualified and acting administrator of said estate and brings this suit as such administrator.

27 II.

That on and since the 2nd day of January, 1903, plaintiff through his predecessor and grantor, was, ever since has been and now is the owner (subject to the paramount title of the United States) and in possession and entitled to the possession, by virtue of the discovery of mineral thereon and location thereof according to law, made on said 2nd day of January, 1903, and by marking the boundaries thereof and performing all the acts required by law and the rules and regulations of the Uintah Mining District, Summit County, Utah,

of that certain lode mining claim known as the Divide, situate in said Uintah Mining District and more particularly described as follows, to wit:

Commencing at corner No. 1 of the divide from which post No. 4 of the Summit Claim patented Lot 329, bears S. 32 deg. 19 min. E 113.8 ft. distant; thence S. 74 deg. 30 min. W. 569.9 ft. to corner No. 2; thence S. 74 deg. 33 min. E. 101.1 feet to corner No. 3; thence S. 28 deg. 18 min. E. 887.2 ft. to corner No. 4; thence N. 74 deg. 30 min. E. 388.4 ft to corner No. 5; thence N. 26 deg. 24 min. W. 940.9 ft. to place of begin-ing.

III.

That since the location of said Divide, as aforesaid, plaintiff with his predecessor and grantor, have done and performed not less than $100 worth of labor and improvements upon said claim during each and every year for the development of said claim, and has performed each and every act required by law, for the purpose of holding said claim.

IV.

That defendant, claiming to be the owner of a certain adjacent mining claim, known as the Cliff, did, on or about the 17th day of October, 1904, cause said alleged mining claim to be so surveyed as to cross upon and overlap said Divide mining claim, the property of this plaintiff, and to include the portion thereof described as follows, to wit:

Beginning at corner No. 1 of the Cliff lode, U. S. Survey No. 5312, thence on true course N. 26 deg. 31 min. W. 478.4 ft. to cor. No. 1 of the Wedge lode, Lot 159, identical with Cor. No. 2 of the Lucky John lode (amended) Lot 156; thence N. 33 deg. 56
28 min. W. 123.7 ft. to a point of intersection of the west side line of the Divide lode with the east end line of the Lucky John lode; thence N. 28 deg. 18 min. W. 53.3 ft. to a point of intersection of the west side line of the Cliff lode with the south side line of the Ottumwa lode Lot 716; thence N. 74 deg. 30 min. E. along the north end line of the Divide lode, 308.5 ft. to Cor. No. 6 of the Fraction lode, Lot 713; on the south side line of the Ottumwa lode and north end line of the Divide lode; thence S. 52 deg. 40 min. E. 211.10 feet to a point of intersection of the west end line of said Fraction lode with the west end line of the Summit lode, Lot 329; thence S. 1 deg. 00 min. W. 139.5 ft. to corner No. — of the said Summit lode; thence S. 89 deg. 00 min. E. 68.8 ft. to Cor. No. 8 of the U. S. lode, Lot 715; thence S. 30 deg. 45 Min. E. 212.2 ft. to a point of intersection of the west end line of said U. S. lode with the east side line of the Divide lode; thence S. 26 deg. 04 min. E. 251.2 to a point on the east side line of the Divide lode, on the east side line of the Cliff lode aforesaid, and on the north side line of the Maud H. lode, Lot 585, bearing N. 26 deg. 04 min. W 4.7 ft. from Cor. No. 5 of the Divide and Cor. No. 4 of the Cliff lode; thence N. 87 deg. 41 min. W. 440.4 ft. to the place of beginning. Containing 6.038 acres, more or less.

V.

That on or about the 1st day of February, 1905, defendant filed the field notes and diagram of said survey of the said alleged Cliff, together with an application of a United States patent for said mining claim, in the United States Land Office at Salt Lake City, Utah, and caused the Register of said Land Office to give notice of said application for patent in the manner prescribed by law. That in and by said application for patent defendant wrongfully set up and alleged that he was and is the owner and in possession and entitled to the possession of the whole of said alleged Cliff mining claim, including the premises last above described, and the lodes therein, being the whole of said Divide claim, the property and in the possession of the plaintiff.

VI.

That the plaintiff, on or about the 3rd day of April, 1905, and during the sixty days' period of publication of the notice of application for patent for said alleged Cliff claim, filed in the said Land Office, under oath, a protest and adverse claim to the said
29 application for patent, showing the nature, boundaries and extent of the adverse claim of this plaintiff. That thereupon proceedings in said land office upon said application for patent were, *are and* stayed to await the determination by a court of competent jurisdiction of the rights of possession of said last described premises and the rights of the respective parties therein and thereto; and to that end plaintiff brings this suit, the period of thirty days not yet having elapsed since the filing of said protest and adverse claim.

VII.

That defendant maintains and prosecutes said application for patent for said alleged Cliff claim, and that thereby the title of this plaintiff in and to said last described premises, being the area thus brought in conflict between said Divide and said alleged Cliff, is wrongfully impeached, clouded and encumbered and the value of plaintiff's estate and property therein depreciated to his great damage.

Therefore, plaintiff prays judgment against the defendant for a decree of this court decreeing that plaintiff is the owner and lawfully in possession and entitled to the possession of said described area in conflict and the lodes therein, and confirming plaintiff's title thereto and possession thereof. That defendant be restrained, during the pendency of this action, and upon trial perpetually, from entering upon said area in conflict, or lodes therein, or any part thereof, and from in any way interfering with the plaintiff's possession thereof.

Finally plaintiff prays for general relief and for his costs in this action.

SNYDER & SNYDER,
Attorneys for Plaintiff.

(Duly verified.)

30 In due time the defendant filed the following answer:

(Title of the Court and Cause.)

Answer.

Now comes the above named defendant, and for answer to the complaint of the plaintiff herein admits, denies and alleges as follows:

This defendant admits the allegations of paragraph one of said complaint.

Defendant denies each and all of the allegations contained in paragraphs 2 and 3 of said complaint.

Defendant admits the allegations contained in paragraph 4 of said complaint, and also all the allegations of paragraph 5 of said complaint, except wherein it is alleged that this defendant wrongfully set up and alleged that he was the own.. and in the possession, and entitled to the possession, of the whole of said Cliff mining claim, including the premises described in said complaint; on the contrary, defendant alleges that he rightfully made said claim, and denies that he did it wrongfully.

Defendant denies upon information and belief each and all of the allegations, matters, and things contained in paragraph- 6 and 7 of said complaint.

And for a further and separate answer and defense to said complaint, and by way of affirmative relief, this defendant alleges that he is now, and at all the times hereinafter mentioned has been, a citizen of the United States, and that ever since the 1st day of August, 1901, this defendant has been, and still is, the owner, subject only to the paramount title of the United States, and in the possession and entitled to the possession of the whole and every part of the Cliff lode mining claim, being Mineral Survey No. 5312 of the official surveys of and within the Uintah Mining Dis-
31 trict, Summit County, State of Utah, particularly described with magnetic variation at 16 degrees .05 minutes to 17 degrees .09 minutes East, as follows, to wit:

Commencing at post No. 1, a corner of the claim, from which the southeast corner of Sec. 25, Township 2 South, Range 3 East Salt Lake Base Meridian, bears south 42 deg. 59 min. east 617.6 ft.; thence running from said corner No. 1 north 28 deg. 18 min. West 807.9 ft. to corner No. 2; thence south 87 deg. .09 min. east 478.6 ft. to corner No. 3; thence south 26 deg. .04 min. east 789.8 ft. to corner No. 4; thence north 87 deg. .09 min. west 442.6 ft. to corner No. 1 being the place of begin-ing. Said claim being located in the southeast quarter of Section 25, Township 2, South range 3 East, and the southwest quarter of Section 30, Township 2 South Range 4 East Salt Lake Base and Meridian, and containing a total of 7.310 acres; excluding however therefrom the area in conflict with the Maud H., Lot 585; Wedge Lot 159; Lucky John, Lot 156; Ottumwa, Lot 716; Fraction, Lot 713; Summit, Lot 329; and U. S.

Lot 715—such excluded area containing 1.272 acres. Net area claimed and applied for being 6.038 acres.

That the premises referred to and particularly described in the complaint as the alleged conflict area, have, ever since the location of said Cliff lode mining claim, constituted, and do now constitute, part and parcel thereof as hereinbefore described, and belonging thereto and to the defendant as the owner of said Cliff lode mining claim.

The plaintiff has no right, title or interest in or to the Cliff lode mining claim, or any part thereof, or of, in or to the part thereof described in the complaint, and that plaintiff's alleged adverse claim is wrongful and without right.

Wherefore, defendant prays judgment that the plaintiff
32 take nothing, and that the defendant be decreed to be the owner and entitled to the possession of the Cliff lode mining claim, including the premises set forth in the complaint as the alleged conflict area. That the plaintiff be adjudged to have no right, title or interest in and to the said or any part of said premises described in the complaint as the alleged conflict area. That the defendant's right and title be forever quieted and confirmed as against the plaintiff, and all persons claiming under it, and that they and each of them, and all persons claiming under them and each of them, be forever estopped and barred from at any time hereafter setting up any right or title to said or any part of said premises; also for all equitable and proper relief, and for costs of suit.

DEY AND STEVENS,
Attorneys for Defendant.

(Duly verified.)

(Title of the Court and Cause.)

Reply.

The plaintiff in the above entitled action files this his reply to the affirmative matter pleaded in defendant's answer herein, and

1. Admits that defendant is a citizen of the United States as therein alleged.

2. Denies each and every allegation contained therein.

Wherefore plaintiff prays judgment according to the demand of his original complaint on file herein.

SNYDER & SNYDER,
Attorneys for Plaintiff.

(Duly verified.)

Thereupon the case was tried by the court, upon the stipulations of fact made by the parties, and upon the oral and documentary evidence admitted by the court, and also, at the same time was considered by the court the following amendment to the reply:

33 Alleges that at the time and date of the attempted location of the said Cliff patented mining claim, the ground therein

contained was not any part of the open and unclaimed mineral land of the United States, but on the contrary the whole thereof, including the point and place of discovery of said alleged Cliff mining claim was then embraced and included and contained in a valid and subsisting mining claim, called the South Mountain, then and there property and in the possession of the predecessors of the plaintiff's intestate; and for the reason that the discovery of said alleged Cliff mining claim was not placed upon unoccupied and unclaimed land of the United States, the alleged location based thereon became absolutely void.

Thereupon the case was submitted to the court, and after having duly considered the same, the court made and filed the following findings of fact and conclusions of law:

(Title of Court and Cause.)

Findings of Fact.

1. That the plaintiff and defendant are, and at all times herein mentioned were, citizens of the United States, and that plaintiff's intestate, John G. Rhodin, was a citizen of the United States.

2. That the said defendant, James Farrell, is now, and ever since the first day of August, 1901, has been, the owner (subject only to the paramount title of the United States), in the possession, and entitled to the possession of the Cliff lode mining claim, situate in the Uintah Mining District, County of Summit, State of Utah.

3. That said James Farrell, the locator of said Cliff lode mining claim, at the time of location of said claim, to-wit, on the 1st day of August, 1901, discovered a mineral bearing vein or lode within the limits of said claim, and on said day posted a written
34 notice of location at the discovery point within said claim. Said notice described said claim by reference to permanent monuments and natural objects, so it could be identified, and also contained the name of the locator, the date of location, and the name of said claim. Thereupon said defendant sufficiently marked on the ground the boundaries of said mining claim, by setting stakes at the corners of said claim and marked the stakes to identify them with reference to the claim, and thereupon duly *called* said notice of location to be recorded in the office of the County Recorder of Summit County, Utah.

4. That said defendant has in each year since said location, done work and made improvements on said mining claim, of the value of more that $100.00, including the year 1905.

5. That after the location of the said Cliff lode mining claim, and on or about the 2nd day of January, 1903, said John G. Rhodin discovered a lode of rock in place, bearing silver and other metals, within the boundaries of said Cliff mining claim, and located the said Divide lode mining claim, and properly maked the same on the ground so that the boundaries could be readily traced; posted a notice of location at the discovery point, and duly recorded said notice in the office of the County Recorder of said Summit County,

Utah, which said notice contained the name of the locator, the name of the location, and such a description of the claim located, with reference to natural objects and permanent monuments as to identify the same.

6. Since the location of said Divide lode mining claim the said plaintiff and his intestate, during his lifetime, annually performed at least $100.00 worth of labor and improvements upon said claim, up to and including the year 1905.

7. That on or about the 17th day of October, 1904, said
35 James Farrell caused said Cliff lode mining claim to be surveyed for United States patent, and thereafter, on the 1st day of February, 1905, said defendant duly applied for patent for said claim, by filing his application for a United States patent in the United States Land office at Salt Lake City, Utah, and caused notice thereof to be duly published as provided by law. That during the period of publication, said plaintiff, on or about the 3rd day of April, 1905, duly filed an adverse claim in the said United States Land Office, to the application of said plaintiff, for a portion of said Divide lode mining claim that conflicts with said Cliff lode mining claim, as more particularly described in the complaint herein, and that thereupon and within the time allowed by law, said plaintiff brought this suit, on the 2nd day of May, 1905, in support of said adverse claim.

8. That upon the trial of said action plaintiff offered evidence (subject to the objection of the defendant that the same was incompetent, immaterial and irrelevant, and that no adverse claim was filed on behalf of the South Mountain lode claim) tending to show that during the month of August, 1900, the ground in controversy herein was located by W. I. Snyder and Thomas Roscamp, respectively citizens of the United States, under the name of the South Mountain lode mining claim. That a discovery of a vein was made, and notice of location posted, and the boundaries of said claim marked so that the same could be readily traced, and that said notice was in due form and was duly recorded in the office of the County Recorder of Summit County, State of Utah. That no work was ever done on said South Mountain claim, and that said South Mountain claim lapsed and become forfeited for want of work thereon, on December
36 21, 1901. That no adverse claim was filed on behalf of said South Mountain lode against the application for patent for said Cliff lode mining claim. That on or about the 13th day of October, 1902 said Snyder and Roscamp made a deed purporting to convey said alleged South Mountain lode mining — to said John G. Rhodin.

9. That the said Cliff, Divide and South Mountain claims, as located, cover substantially the same ground, and that the place of discovery of said Cliff lode mining claim was within the boundaries of said alleged South — mining claim.

10. That the plaintiff has no right, title or interest, in or to the Cliff lode mining claim, more particularly described in the answer of defendant herein, or any part thereof, or of, in or to the part thereof described in the complaint herein as being in conflict with said Divide lode mining claim, and that the adverse claim of said plain-

tiff is wrongfully and unlawfully claiming. That said conflict area is particularly described as follows, to-wit:

Begin-ing at corner No. *L* of Cliff lode, U. S. Survey No. 5312, thence on true course N. 26 deg. 51 min. W. 478.4 Ft. to corner No. 1 of the Wedge lode, Lot 159, identical with Cor. 2 of the Lucky John lode (amended) Lot 156; thence N. 33 deg. 56 min. W. 123.7 ft. to a point of intersection of the west side line of the Divide lode with the east end line of the Lucky John lode; thence 28 deg. 18 min. W. 53.3 ft. to a point of intersection of the west side line of the Cliff lode with the south side line of the Ottumwa lode, Lot 716; thence N. 74 deg. 30 min. E. along the north end line of the Divide lode, 308.5 ft. to Cor. No. 6 of the Fraction lode, Lot 713; on the south side line of the said Ottumwa lode and the north end line of the Divide lode; thence S. 52 deg. 40 min. E. 211.10 ft. to a point of intersection of the west end line of said Fraction lode with the west end line of the Summit lode, Lot 329; thence S. 1 deg. 00 min. W. 139.5 ft. to Cor. No. 1 of said Summit lode, Lot 329; thence S. 89 deg. 00 min. E. 68.8 ft. to Cor. No. 8 of U. S. Lode, Lot 715; thence S. 30 deg. 45 min. E. 212.2 ft. to a point of intersection of the west end line of said U. S. lode with the east side line of the Divide lode; thence S. 26 deg. 04 min. E. 251.2 ft. to a point on the east side line of the Divide lode, on the east side line of the Cliff lode aforesaid, and on the north side line of the Maud H. lode, Lot 585, bearing N. 26 deg. 04 min. W. 4.7 ft. from Cor. No. 5 of th eDivide and Cor. No. 4 of the Cliff lode; thence N. 87 deg. 41 min. W. 440.4 ft. to the place of begin-ing. Containing 6.038 acres, more or less.

37 *Conclusions of Law.*

1. That the defendant at the time of the commencement of this action, was the owner and in the possession of the mining claim called the Cliff, which was then, and still is, a valid mining claim, embracing and including the premises specifically described in the findings of fact herein (subject only to the paramount title of the United States).

2. That the plaintiff has no right, title or interest in said premises, or any part thereof, and had none at the time this action was commenced.

3. That the defendant is entitled to a judgment or decree declaring, confirming and quieting his title to said Cliff lode mining claim and said premises described in the complaint and findings of fact herein, and specifically described as the area in conflict; and that the plaintiff has no right, title or interest in said premises or any part thereof; and for costs.

Dated December 19th, 1905.

T. D. LEWIS, *Judge.*

(Title of the Court and Cause.)

Decree.

This cause having heretofore been brought on for trial before the court, plaintiff herein appearing by W. I. Snyder, and the defendant herein appearing by Charles C. Dey, and the court having heretofore rendered its decision, and having filed its findings of fact and conclusions of law.

Now therefore, upon motion of Dey & Stevens attorneys for defendant, it is hereby ordered, adjudged and decreed that the plaintiff herein take nothing by his said action.

It is here further ordered, adjudged and decreed, that the defendant, James Farrell, is the owner, in possession, and entitled to the possession, except as against the paramount title of the United
38 States of all those premises situated in the Uintah Mining District, Summit County, State of Utah, known as the Cliff lode mining claim, more particularly described in the answer of the defendant herein, including all and every part of the conflict area described in said findings of fact and in the complaint herein, as follows, to-wit:

Beginning at Cor. No. 1 of the Cliff lode, U. S. Survey No. 5312, thence on true courses N. 26 deg. 51 min. W. 478.4 ft. to Cor. No. 1 of the Wedge lode, Lot 159, identical with Cor. 2 of the Lucky John lode (amended) Lot 156; thence N. 33 deg. 56 min. W. 123.7 ft. to a point of intersection of the west side line of the Divide lode with the east end line of said Lucky John lode; thence N. 28 deg. 18 min. W. 53.3 ft. to a point of intersection of the west side line of the Cliff lode with the south side line of the Ottumwa lode, Lot 716; thence N. 74 deg. 30 min. E. along the north end line of the Divide lode, 308.5 ft. to Cor. No. 6 of the Fraction lode, Lot 713; on the south side line of the said Ottumwa lode and north end line of the Divide; thence S. 52 deg. 40 min. E. 211.10 ft. to a point of intersection of the west end line of said Fraction lode with the west end line of the Summit lode, Lot 329; thence S. 1 deg. 00 min. W. 139.5 ft. to Cor. No.—of the said Summit lode, Lot 329; thence So. 89 deg. 00 min. E. 68.8 ft. to Cor No. 8 of the U. S. lode, Lot 715; thence S. 30 deg. 45 min. E. 212.2 ft. to a point of intersection of the west end line of said U S. lode with the east side line of the Divide lode; thence S. 26 deg. 04 min. E. 251.2 ft. to a point on the east side line of the said Divide lode, on the east side line of the Cliff lode aforesaid, and on the north side line of the Maud H. lode, Lot 585, bearing N. 26 deg. 04 min. W. 4.7 ft. from Cor. No. 5 of the Divide and Cor. No. 4 of the Cliff lode; thence N. 87 deg. 41 min. W. 440.4 ft. to the place of begin-ing. Containing 6.038 acres, more or less.

It is further ordered, adjudged and decreed that the plaintiff has no right, title or interest in said premises, or any part thereof, and had none at the time of the commencement of this action.

It is further ordered, adjudged and decreed, that the title of said defendant in and to said premises, and each and every part thereof,

is hereby quieted and confirmed as against the plaintiff, and as against all persons, whatsoever.

It is further, ordered, adjudged and decreed that the defendant, James Farrell, do have and recover from the plaintiff his costs herein taxed at the sum of —— Dollars.

39 Dated December 19th, 1905.

T. D. LEWIS, *Judge.*

And because, upon the facts found, the said conclusions of law and decree, so made by the court aforesaid, were in favor of said defendant and against said plaintiff; the said plaintiff then and there by force of the statute, duly excepted and now excepts for the reason, that the said conclusions of law and decree were not supported by, but were contrary to the facts found and were and are contrary to law.

Wherefore the foregoing matters, being proper to be inserted in a bill of exceptions are considered by the court, and the court now signs, seals and allows the same and hereby settles said bill of exceptions accordingly.

Dated this *13* day of January 1906.

T. D. LEWIS, *Judge.*

40 In the District Court of Utah in and for Summit County.

JAMES M. LOCKHART, Administrator of the Estate of John G. Rhodin, Deceased, Plaintiff,

vs.

JAMES FARRELL, Defendant.

Divide *vs.* ——.

Notice of Appeal.

Please take notice, that the plaintiff in the above entitled action hereby appeals to the supreme court of this State, from the judgment therein made and entered, in said district court, on the 19th day of December 1905, in favor of the defendant in said action, and against said plaintiff, and from the whole thereof.

SNYDER & SNYDER,
Attorneys for Plaintiff.

Dated this 3rd day of January 1906.

To the Clerk of said District Court, and to Dey and Stevens, attorneys for defendant.

Service accepted this 13th day of January 1906.

DEY & STEVENS,
Attorneys for Defendant.

41 In the District Court of the Third Judicial District of the State of Utah in and for the County of Summit.

JAMES M. LOCKHART, Administrator of the Estate of John G. Rhodin, Deceased, Plaintiff,

vs.

JAMES FARRELL, Defendant.

Clerk's Certificate.

STATE OF UTAH, *County of Summit, ss:*

I, W. Calderwood, Clerk of the Third Judicial District Court of the State of Utah, in and for the County of Summit, do hereby certify that the foregoing complaint, answer, reply, stipulation, findings of fact, conclusions of law and decree, memorandum of costs and disbursements, bill of exceptions, notice of appeal to the Supreme Court of the State of Utah, numbered respectfully from 1 to 32, constitute the judgment roll in this action; that they are the original papers filed with me in said cause, and they are by me hereby transmitted to the Clerk of the Supreme court of the State of Utah, pursuant to notice of appeal filed by the plaintiff above named and annexed to said judgment roll.

I further certify that an undertaking on appeal, in due form, in the sum of $300.00, is now on file with me.

Witness my hand and the seal of said Court, this 16th day of January, A. D. 1906.

[SEAL.] W. CALDERWOOD, *Clerk.*

42 In the Supreme Court of the State of Utah.

Regular February Term, February 27, 1906.

JAMES M. LOCKHART, Administrator of the Estate of John G. Rhodin, Deceased, Appellant,

v.

JAMES FARRELL, Respondent.

Submission.

This cause coming on regularly for hearing was argued by Hon. W. I. Snyder in behalf of appellant; by Hon. C. C. Dey in reply, was submitted, and by the court taken under advisement.

43 In the Supreme Court of the State of Utah.

Regular May Term, September 29, 1906.

JAMES M. LOCKHART, Administrator of the Estate of John G. Rhodin, Deceased, Appellant,

v.

JAMES FARRELL, Respondent.

Judgment.

This cause having been heretofore argued and submitted, and the court being sufficiently advised thereon, it is now here considered, ordered, and adjudged, that the judgment of the court below be, and the same is hereby reversed, and a judgment entered in favor of the appellant decreeing to him the possession of the ground. Costs to be taxed against respondent.

44 In the Supreme Court of the State of Utah.

JAMES M. LOCKHART, Administrator of the Estate of John G. Rhodin, Deceased, Appellant,

v.

JAMES FARRELL, Respondent.

STRAUP, *J.*:

The respondent applied for patent to the Cliff lode mining claim located by him August 1, 1901. The appellant adversed the application, claiming the right to the possession of the same ground as owner and claimant of the Divide lode mining claim located by his intestate January 2, 1903. This action was brought pursuant to section 2326, R. S., U. S., to adjudicate these adverse claims. Upon findings made by the trial court a judgment was entered for the respondent, decreeing to him the possession of the ground. On the trial the appellant offered evidence tending to prove that at the time of the location of the Cliff claim the ground so located and in controversy was covered by a prior valid and subsisting location called the South Mountain, located by W. I. Snyder and Thomas Roscamp on August 21, 1900, but which became forfeited December 31, 1901, for non-performance of the annual labor and development work required by law; and that no adverse claim was filed in behalf of the South Mountain against the application for patent. This evidence was received by the court subject to the objection that it "was incompetent, irrelevant and immaterial, and that no adverse claim was filed on behalf of the South Mountain." The court specifically found "that the said Cliff, Divide and South Mountain claims,
45 as located, cover substantially the same ground, and that the place of discovery of said Cliff lode mining claim was within the boundaries of said alleged South Mountain mining claim."

There being no adverse filed on behalf of the South Mountain

claim, the decisive question is whether the appellant, as owner of the Divide claim, who, as such, adversed the application for patent is in position to show and assert that at the time of the location of the Cliff claim the ground located was covered by the South Mountain, a then valid and subsisting claim; that the discovery point of the Cliff was within the boundaries of the South Mountain; and that, therefore, the locator of the Cliff did not discover a vein or lode on, or make a valid location of, unappropriated and unoccupied mineral lands of the United States, and because thereof his location is and was void not only against the locators of the South Mountain, but all the world.

The following propositions may be said to be well established and generally recognized: (1). That a discovery of a vein or lode on unoccupied and unappropriated mineral lands of the United States is a prerequisite to a valid location of a mining claim. (2). That a location based upon a discovery within the limits of an existing and valid location is void. (3). That what has been located once under the law shall not be relocated until the first location has expired, until the rights of the former owner or locator have come to an end, and until in law he has forfeited or abandoned his claim and left the property open for another to take up. Until such abandonment or forfeiture, the ground is not subject to relocation, for it is essential that at the time of the location the ground located should be a part of the public domain. Hence a relocation on lands actually covered at the time by another valid and subsisting location
46 is void; and this not only against the prior locator, but all the world, because the law allows no such thing to be done. (4). That when a forfeiture has been occasioned the claim or mine upon which such failure occurred shall be open to relocation in the same manner as if no location of the same had ever been made, provided that the original locators, their heirs or assigns, or legal representatives, have not resumed work upon the claims after failure and before such location. (5). That a location to be good must be good when made, and that each claimant must stand on his own location and can take only what it will give him under the law.

These propositions are readily deducible from sections 2319, 2320, 2322, and 2324, R. S., U. S. (U. S. Comp. St. 1901, pp. 1424 to 1427), and are supported by decisions from both Federal and State courts, and by the text writers. Among them may be noticed the following:

Belk *v.* Meagher, 104 U. S. 79.
Gwillim *v.* Donnellan, 115 U. S. 45.
Zerres *v.* Vanina, 134 Fed. 610.
Book *v.* Justice Min. Co., 58 Fed. 106.
Perigo *v.* Erwin, 85 Fed. 904.
Sullivan *v.* Sharp, (Colo.) 80 Pac. 1054.
Kirk *v.* Meldrum, 28 Colo. 453.
Tuolumne Consol. M. Co. *v.* Maier, 134 Cal. 583.
Quigley *v.* Gillet, 101 Cal. 462.
Wilson *v.* Freeman, 29 Mont. 470; 68 L. R. A. 833 and notes.
Upton *v.* Larkin, 7 Mont. 449.

Shattuck *v.* Costello (Ariz.) 68 Pac. 529.
Jordan *v.* Duke (Ariz.) 53 Pac. 197.
Beals *v.* Cone (Colo.) 62 Pac. 948.
Watson *v.* Mayberry, 15 Utah 265.
Reynolds *v.* Pascoe, 24 Utah 219.
1 Snyder on Mines, Secs. 572, 573.
1 Lindley on Mines (2nd. Ed.) Secs. 337, 363.

It, however, in effect, is urged by the respondent that the above propositions, if true, would apply only in a contest between the owners of the South Mountain and the Cliff, had the former not forfeited their claim, and had they adversed the application for patent. In other words, the assertion is made that, under such circum-
47 stances, the location of the Cliff would be invalid as to the owners of the South Mountain claim, but by their failure to adverse the application for patent the Cliff location is valid as to all the world because of an alleged indisputable presumption that no area in conflict between the South Mountain and the Cliff claims ever existed, or, if it existed, whatever paramount rights possessed by the owners of the South Mountain, in effect, inured to the benefit of the owner of the Cliff. Hence, it is argued that the owner of the Divide is not in position to show or assert that the Cliff, when located, was upon ground then covered by the South Mountain, a then valid and subsisting claim, or that the discovery point of the Cliff was within the boundaries of the South Mountain. In support of this contention the case of Lavagnino *v.* Uhlig, 198 U. S. 443, is cited and relied on. We think that case does not decide the question here presented, and does not support the contention of the respondent. There the court dealt with the question of a mere conflict area, a case of overlapping claims between a senior and a junior location predicated on the hypothesis that both were valid locations. The statement of facts on which the opinion was based are, that Uhlig and McKernan applied for patent to mining lode claims known as the Uhlig No. 1 and Uhlig No. 2, located by them January 1, 1899. Lavagnino filed an adverse claim on behalf of the Yes You Do mining claim, located by Smith, a deputy mineral surveyor, who thereafter assigned the claim to Lavagnino. It was alleged that the Uhlig claims overlapped the Yes You Do, and that the area in conflict, as to Uhlig No. 1, was six and a fraction acres, and, as to Uhlig No. 2, one and a fraction acres. Suit was brought by Lavagnino against the applicants for patent to determine the right of possession to the area in con-
48 flict. At the trial Lavagnino offered to show that, when the Uhlig claims were located, the area in conflict was covered by a valid and subsisting claim called the Levi P. The trial court sustained an objection to such proffered evidence, on the theory that the Yes You Do claim was void because located by a deputy mineral surveyor, who, it was held by reason of section 452 R. S., U. S., was prohibited from making a valid location of a mining claim, and, therefore, Lavagnino had no interest in the subject matter of the controversy, and, having no title upon which to base an adverse claim, he stood in relation to the proceedings as a mere stranger, and was,

consequently, not in a position to assail the title of the applicants. The trial court decreed to the applicants the possession of the ground described within the boundaries of their claims. On appeal to this court that judgment was affirmed on the ground taken by the trial court, and, further, because of the bar of the statute of limitations. On appeal to the Supreme Court of the United States the judgment of the trial court was again affirmed—the court assuming, without deciding, that a deputy mineral surveyor was not prohibited from making a valid location of a mining claim—on the theory that, as to a mere conflict area between the Levi P., the senior claim, and the Uhligs, the junior claims, an indisputable presumption arose that no conflict existed by failure of the owner of the prior location to adverse the application for patent, or that whatever paramount right was possessed by him, in effect, inured to the benefit of the junior location. The whole tenor of the opinion, however, shows that the court assumed that the Uhlig claims were valid locations, and that their boundaries merely conflicted with the boundaries of the Levi P.

This is apparent from the very beginning of the opinion, by
49 the court's adopting the finding of the trial court that the Uhlig claims were valid locations. That is to say, it was necessarily assumed, among other things requisite to a valid location, that the locators of the Uhlig claims discovered a vein or lode not within the boundaries of a then valid and subsisting claim, but upon unoccupied mineral lands of the United States, and that their claims, as located and defined by them, merely conflicted with the boundaries of the Levi P., the senior location, without involving the discovery points of any of the claims. And upon this assumption it was held that when the junior locators applied for patent the senior locator, possessed of paramount rights to the areas in conflict, might abandon them, and, in effect, cause them to inure to the benefit of the applicants for patent by failure to adverse. From the statement of facts, as made by Mr. Justice White, and upon which the opinion was predicated, there is no room for the assertion that the discovery points of the Uhlig locations, when made, were within the boundaries of the Levi P., a then valid and subsisting claim. In that respect the status of the parties in the case at bar is wholly different. When the respondent located the ground then covered by the South Mountain, a valid and subsisting claim, he did that which the law forbids. Hence, his location was not only void as to the locators of the South Mountain, but void *ab initio* as to all the world. He did not do that which the law declares shall be done as a prerequisite to a valid location, make a discovery of a vein or lode on unoccupied mineral lands of the United States, but he was a mere trespasser seizing that which then belonged to another. When the locators of the South Mountain thereafter forfeited their claim, their rights

could not in any manner inure to his benefit, for he had not
50 acquired anything to which such rights could attach. That is to say, he had no valid location of any kind to which a mere area in conflict with another and a senior claim could be surrendered or made to inure by virtue of his location. His location, being absolutely void, no act thereafter done by the prior locators, or

by any one else, could confer validity upon it. Being void from the beginning, no life could thereafter be breathed into it. No legal right can be created which is dependent upon a trespass or a tortious entry for its validity. If this proposition is sound, upon what principle of law shall it now be said that the plaintiff, as the owner of the Divide, is not in position to show and urge such invalidity of respondent's location? Because the owners of the South Mountain thereafter forfeited their claim and failed to adverse, and were not in a position to adverse because having no claim upon which to base such action and consequently could not assail respondent's title, shall it now be said that another who asserts a claim to the ground in controversy on a location made by himself and upon which his right to adverse is based is precluded from asserting such invalidity? To so hold is to make the claimants' rights to the possession of the ground dependent solely upon the question of priority of location. To such doctrine we cannot give assent. Suppose respondent had located mineral land when it was within a reservation and not subject to location, and, after it had been opened to location, the appellant had located the same ground, could it be said that the respondent had the better right to its possession because of his prior location? Would it not at once be said that his location was absolutely void and that no right had been acquired by him, and that, in a contest between himself and appellant, respondent's attempted location would be no obstacle to a valid location of the ground made by appellant after it had been opened to the public and become subject to location? In such case respondent's location would be a nullity and just as if it had never been made. (Kendall *v.* San Juan River M. Co., 144 U. S. 658.)

51

In the case at bar it is true that had no adverse claim been filed, the Land Office would have indulged the presumption that no conflicting claims existed to the premises described in the application for patent, but when an adverse claim was filed by the appellant such presumption did not arise, and, by the bringing of an action as by law required, the parties were removed to a court of competent jurisdiction where their respective rights to the possession of the ground were to be determined with no conclusive presumption as to the validity of either title, and where was to be adjudicated upon the facts adduced and proved which of the claimants, if either, was entitled to the possession of the premises in dispute. Before the court both claimants became contestants, and, in a sense, plaintiffs, and each was required to show his title and to recover, if at all, on the strength of it. While in a contest between them the court may indulge the presumption that the location prior in time, *prima facie* at least, has the better right, yet it has but the effect of casting the onus on the other contestant to rebut such presumption, and the burden of showing the invalidity of such apparently prior location, or the showing of some competent facts which give him a better right to the ground in dispute. In other words, the parties are not concluded by the mere fact of priority of location. If such were the case there would be no necessity of the provision of law requiring an adjudication by the court. While as to the Divide the Cliff location was prior

in time, nevertheless the owner of the Divide, having filed an adverse claim and having brought suit as by law he was required to do in order to have determined which of the two claimants had the
52 better right to the ground in dispute, he was interested in showing that at the time of the location of the Cliff its discovery point was located within the boundaries of the South Mountain, a then valid and subsisting claim, and that the ground so attempted to be located was already covered by a senior claim, and, therefore, was not at that time subject to location; that by reason thereof the location of the Cliff was not only void as against the owners of the South Mountain, but all the world; and, consequently, when the South Mountain became forfeited, the ground was then subject to location by the owner of the Divide, and, in locating it, he had the right to treat the pretended location of the Cliff as a mere nullity, and as not opposing any obstacle to a valid location of the ground by himself.

The case at bar, therefore, presents a different question from the one involved in the Lavagnino case where the opinion of the court was based upon the hypothesis that the Uhlig claims were valid locations, and where only the question of overlapping claims was involved. This case is, therefore, not controlled by that decision, but is controlled by the more recent decision of the Supreme Court of the United States in the case of Brown *v.* Gurney, 201 U. S. 184. In that case the Cripple Creek Mining company owned a lode mining claim called the Kohnyo. The claim conflicted with a patented placer which divided it into two parts. The discovery of mineral on the lode claim was made, and the workings and improvements were, on the north 500 feet of the claim. The south end, being 700 feet in length, was without development work. The local Land Office permitted the claimant of the Kohnyo to enter the two tracts, separated by the placer claim, as one claim, but the Department
53 ultimately refused to issue a patent for such tract, basing the refusal upon the ground that two portions of a mining claim separated by a patented placer could not be included within one patent. The applicant, however, was given the privilege to apply for patent upon either of the segregated tracts, and directed that in default of an election or appeal by the claimant, within sixty days from the date of the order, May 28, 1895, the entry of that portion of the claim (the 700 feet) lying south of the placer should be cancelled. No appeal was taken, but the claimant of the Kohnyo instituted proceedings against the claimants of the placer to secure title to the vein of the Kohnyo, which, it was claimed, passed through the portion of the placer claim which conflicted with the Kohnyo location. On May 7, 1898, a decision was rendered against the claimant of the Kohnyo. On June 14, 1898, the claimant of the Kohnyo filed in the Land Office a written instrument by which it elected to retain and patent the north end of the Kohnyo claim. On July 15, 1898, the Commissioner of the General Land Office cancelled the entry of the Kohnyo claim south of the placer claim. On May 13, 1898, Brown located this 700 feet as the Scorpion lode claim. On June 23, 1898, Gurney located the same premises as the Hobson's

Choice lode claim, and, on July 16, 1898, Small located the same ground as the P. G. claim. Brown applied for patent as the owner of the Scorpion. Gurney adversed this application as the owner of the Hobson's Choice, as did Small also, as the owner of the P. G. Claim. The trial court awarded the possession of the ground to Brown. On an appeal the Supreme Court of the State reversed that judgment and awarded the possession to Gurney. On an appeal to the Supreme Court of the United States, in affirming the latter judgment the court said:

54 "In adverse proceedings each party is practically a plaintiff and must show his title. (Citing case.) * * * Of course it is essential that at the date of a location the ground located on should be part of the public domain, and in the present case the specific question affirmatively raised was whether the ground in controversy was a part of the public domain at the time of the respective contested locations."

In determining the matter the court said that the important question was whether the ground in controversy reverted to and became a part of the public domain from the time of the "decision of the Secretary, May 7, 1898; or from the filing of the Kohnyo claimant of its election to retain the northerly tract and relinquish the other, June 14, 1898; or upon the formal cancellation of the entry July 15, 1898." After a discussin of the question the conclusion was reached that such fact resulted from the election and abandonment filed by the Kohnyo claimant June 14, 1898. Thereupon it was further observed by the court:

"That by reason of that abandonment, the southerly tract, for the first time, reverted to and became a part of the public domain. And as the Hobson's choice was the first location of the ground made after such abandonment, it follows that it was valid and that its owner was entitled to a decision in its favor. We again state the dates of the respective locations. The Scorpion was located May 13, 1898. The Hobson's Choice was located June 23, 1898. The location of the P. G. was July 16. Thus it is seen that the Scorpion was attempted to be located at a time when the premises were not subject to location; that the Hobson's Choice was located when the premises has reverted to the public domain; and that the location of the P. G. was after that date."

In that case the doctrine, that it is essential that at the date of the location the ground located on should be part of the public domain and that ground covered by an existing location is not subject to relocation until forfeiture or abandonment of the prior location, is again emphasized. This doctrine is not disputed but is fully recognized in the Lavagnino case where in the opinion it is said that the ground in dispute when located by Smith, the Yes You Do locator, "was not unoccupied mineral lands of the United

55 States and consequently not subject to be relocated by Smith," because embraced within the then locations of the prior valid and subsisting Uhlig claims. Giving the Lavagnino case the construction contended for by the respondent, is, in effect, to make it overrule Belk *v.* Meagher and Gwillim *v.* Donnellan, and to render

it in conflict with the decisions of both Federal and State courts on the question. We do not believe any such result was intended by that decision. Likewise, to give it the meaning contended for renders it in conflict with the more recent decision of Brown *v.* Gurney. Whatever room there may be for the contentions (Ambergris Min. Co. *v.* Day, 85 Pac. 109, and Wilson *v.* Freeman, 68 L. R. A. 842, note V.) that the Lavagnino case is in conflict with or distinguishable from prior decisions, it is sufficient for us that we follow Brown *v.* Gurney more recently decided, and which more nearly applies to the facts of the case at bar.

It necessarily follows, from what we have said, that we have reached a conclusion different from that of the trial court, and hence the order of this court is that the judgment of the court below be reversed and a judgment entered in favor of the appellant decreeing to him the possession of the ground. Costs to be taxed against respondent.

I concur, Bartch, C. J. in the Judgment.

I concur, McCarty, J.

56 Supreme Court of the United States.

JAMES FARRELL, Plaintiff in Error,
vs.
JAMES M. LOCKHART, Administrator of the Estate of John G. Rhodin, Deceased, Defendant in Error.

Petition for Writ of Error.

Comes now James Farrell above named, and respectfully shows to the court:

1. That said James M. Lockhart, administrator of the estate of John G. Rhodin, deceased, as plaintiff, brought suit against petitioner James Farrell as defendant, in the Third Judicial District Court of the State of Utah, in and for Summit County, in pursuance to the requirements of Sec. 2326 of the Revised Statutes of the United States, claiming to be the owner, as against said defendant, James Farrell, of the Divide mining claim, situate in the Uintah Mining district, County and State aforesaid.

2. That in and by his complaint therein, said plaintiff alleged his ownership of the Divide mining claim, located January 2nd, 1903. Also alleged performing not less than $100 worth of labor and improvements during each year for the development of said claim, and further alleged that said defendant, James Farrell, claiming to be the owner of the Cliff mining claim, on or before the 17th day of October, 1904, caused said Cliff mining claim to be so surveyed as to cross upon and overlap said Divide mining claim and to include the portion thereof particularly described in said complaint. Also alleged that on or about the 1st day of February, 1905, said defendant filed the field notes and diagram of said survey of said Cliff claim, together with an application for United States patent

for said mining claim, in the United States Land Office at Salt Lake City, Utah, and caused the Register of said Land Office to give notice of said application for patent in the manner prescribed by law; and further alleged that on or about the 3rd day of April, 1905,
57 and during the sixty days of publication of the notice of application for patent for said Cliff claim, plaintiff filed in said Land Office, under oath, an adverse claim to said application for patent, showing the nature, boundaries, and extent of the adverse claim. That thereupon, proceedings in said Land Office upon said application for patent, were staid to await the determination by a court of competent jurisdiction of the rights of possession of said premises and rights of respective parties thereof, and thereto, and to that end plaintiff brought this suit, the period of thirty days not having elapsed since the filing of said adverse claim, and prayed judgment against the defendant, that the plaintiff be decreed the owner and lawfully in possession and entitled to the possession of said described area in conflict, and confirming plaintiff's title thereto and possession thereof and for general relief.

3. That the said defendant, James Farrell, filed his answer to said complaint, denying the material allegations therein, and by way of affirmative relief, alleged that since the 1st day of August, 1901, he had been and still was owner, subject only to the paramount title of the United States, and in possession of all and every part of the Cliff lode mining claim, Mineral Survey No. 5312, specifically describing said claim. Also alleged that the premises described in the complaint as the conflict area, have, ever since the location of said Cliff mining claim, constituted and do now constitute, a part and parcel thereof. Also that plaintiff had no right, title, or interest in or to said Cliff mining claim, or any part thereof or in or to the part described in the complaint, and that plaintiff's alleged adverse claim is wrongful and without right; praying judgment that the plaintiff take nothing, and that the defendant be decreed to be the owner and entitled to the possession of the Cliff mining claim, including the premises set forth in the complaint as the alleged conflict area, and quieting and confirming the title of the defendant thereto.

4. That said plaintiff filed a reply to the answer of said defendant, in which, after admitting citizenship of defendant, he denied each and every allegation contained in said answer.

58 5. That the said cause came on to be heard before the said District Court, and upon said trial it appeared by the undisputed evidence, and the court so found, that the said Cliff lode mining claim was located on the 1st day of August, 1901, by your petitioner, James Farrell, who did the necessary acts to constitute a valid location; also that on or about the 2nd day of January, 1903, said John G. Rhodin, plaintiff's intestate, made the location of the Divide lode mining claim, overlapping and conflicting with said location of said Cliff claim. That each of said parties did the annual work upon their respective mining claims, as required by law, including the year 1905. Thereupon the plaintiff sought to amend his reply to the answer of said defendant, by alleging in substance, that at the time and date of the location of the Cliff mining claim, the ground

therein contained was not open and unclaimed mineral land of the United States, but on the contrary, the whole thereof, including the point and place of discovery of said Cliff mining claim, was on ground then embraced, included, and contained in a valid and subsisting mining claim, called the South Mountain mining claim, and that the discovery of said Cliff mining claim was not placed upon unoccupied and unclaimed land of the United States. That in support of said amendment, plaintiff then and there offered, and the court received evidence, subject to the objection of defendant that the same was incompetent, immaterial and irrelevant, and that no adverse claim was filed on behalf of the South Mountain lode; which evidence so offered and received the court found tended to show that during the month of August, 1900, the ground in controversy herein, was located by W. I. Snyder and Thomas Roscamp, under the name of the South Mountain lode mining claim. That no work was ever done upon said South Mountain mining claim, and that said South Mountain claim lapsed and became forfeited for want of work thereon, on December 31, 1901. That no adverse claim was filed on behalf of said South Mountain against the defendant's application for patent for said Cliff lode mining claim. Thereupon, the court found as conclusions of law that the defendant, at the time of the commencement of this action, was the owner and in possession of said Cliff mining claim, which was then, and still is, a valid
59 mining claim. Also, that the plaintiff had no right, title, or interest in said premises or any part thereof and had none at the time this action was commenced, and entered its decree, adjudging that the defendant, James Farrell, is the owner, in possession, and entitled to the possession of the Cliff mining claim, as described in the answer of the defendant, including all and every part of the conflict area, described in the findings of fact, and in the complaint herein, and quieting the title of the defendant as against the plaintiff.

6. Thereupon in due time, said plaintiff prosecuted an appeal from said judgment to the Supreme Court of the State of Utah, and assigned as error that the decree and judgment was not supported by the findings of fact, in that the court erroneously found as a conclusion of law that the said defendant, having the senior location as between the Cliff and Divide, was entitled to the conflict area, regardless of the fact that his discovery was placed upon a then valid and subsisting claim. That upon the hearing of said cause in the Supreme Court of Utah, it was contended by your petitioner, the respondent therein, that under Secs. 2325 and 2326 of the Revised Statutes of the United States, that the plaintiff could not defeat the validity of the Cliff claim for which patent was applied, by showing that at the time the Cliff claim was located, the alleged South Mountain claim included the conflict area, between the Cliff and Divide, and the discovery of the Cliff claim—no adverse having been filed on behalf of said South Mountain, and said South Mountain claim having become forfeited prior to defendant's application for a patent.

7. That the Supreme Court of the State of Utah, on the 30th day of September, 1906, entered its judgment, decreeing that the judg-

ment of the court below be reversed, and a judgment entered in favor of the appellant, decreeing to him the possession of the ground.

8. That the Supreme Court of the State of Utah in deciding said cause and in reversing said judgment, rested its conclusion upon its construction of Secs. 2319, 2320, 2322, 2323, and 2324, of the Revised Statutes of the United States, and did not give effect to Sec. 2326 and Secs. 2319, and 2324 of the Revised Statutes of the
60 United States, as construed by this court in Lavagnino *vs.* Uhlig, 198 U. S., 443.

In this judgment of the Supreme Court of the State of Utah, your petitioner, by his counsel, is advised and verily believes, and therefore states, that error was committed to his great detriment and injury, which will more fully appear from the assignment of errors, which is filed with this petition.

Wherefore, your petitioner prays that a Writ of Error may issue in this behalf to the Supreme Court of the State of Utah, for the correction of the errors so complained of, and that a transcript of the record, proceedings, and papers in this cause, duly authenticated, may be sent to the Supreme Court of the United States.

Dated October 24, 1906.

JAMES FARRELL, *Petitioner.*
By CHARLES C. DEY, AND
A. L. HOPPAUGH,
His Attorneys.

61 THE UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Utah, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment, which is in the said supreme court of the state of Utah, before you, or some of you, being the highest court of law or equity of the said state in which a decision could be had in the said suit between James M. Lockhart, administrator of the estate of John G. Rhodin, deceased, as plaintiff, and James Farrell as defendant, wherein it was drawn in question the construction of a statute of the United States, and wherein the said James Farrell claimed the title and right to the property in question in said suit under a statute of the United States, and the decision of the said supreme court of the State of Utah was against the title and right under the statute of the United States, especially claimed by the said James Farrell, a manifest error has happened to the great damage of the said James Farrell, as by his complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the party aforesaid, in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the 22d day of December, 1906, in the said Supreme Court, to be then and there held, that, the record and proceedings aforesaid being inspected, the

said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of said Supreme Court, the 24th day of October, in the year of our Lord, 1906.

[Seal United States Circuit Court, District of Utah.]

JERROLD R. LETCHER,
Clerk of the United States Circuit Court, District of Utah.

Allowed by,
W. M. McCARTY,
Chief Justice of the Supreme Court of the State of Utah.

62 *Assignment of Errors.*

Now comes James Farrell, petitioner for writ of error to the Supreme Court of the State of Utah, by Charles C. Dey and A. L. Hoppaugh, his attorneys, and says that the said Supreme Court of the State of Utah, in rendering its decision and judgment in this cause, erred in the following particulars, to-wit:

1. The Supreme Court of the State of Utah erred in reversing the judgment and decree of the District Court, and in decreeing to the appellant in said cause the possession of the ground in controversy.

2. The Supreme Court of the State of Utah erred in its decision in this cause in not giving effect to Secs. 2325 and 2326, Revised Statutes of the United States, by deciding, in substance, that the location of the Cliff mining claim made by James Farrell August 1, 1901, was void as against the location of the Divide mining claim, made January 2, 1903, to the extent of the conflict area between them, because of the existence of a location called the South Mountain mining claim, made on August 21, 1900, covering said conflict area, notwithstanding said South Mountain claim became abandoned or forfeited December 31, 1901, and that no work had ever been done upon the same, as required by law, and no adverse claim was filed on behalf of said South Mountain claim against the application by James Farrell for a patent for his Cliff mining claim.

3. That the Supreme Court of the State of Utah erred in admitting into its consideration of this cause as material, competent, and relevant, the facts found by the trial court in its eighth finding of fact, to-wit:

"That upon the trial of said action plaintiff offered evidence (subject to the objection of the defendant that the same was incompetent, immaterial and irrelevant, and that no adverse claim was filed on behalf of the South Mountain lode mining claim) tending to show that during the month of August, 1900, the ground in controversy herein was located by W. I. Snyder and Thomas Roscamp, respectively citizens of the United States, under the name of the South Mountain lode mining claim. That a discovery of a vein was made, and the boundaries of said claim marked so that the same could

readily be traced, and that said notice was in due form and was duly recorded in the office of the County Recorder of Summit County, State of Utah. That no work was ever done upon said South Mountain claim, and that said South Mountain claim lapsed and became forfeited for want of work thereon, on December 31, 1901. That no adverse claim was filed on behalf of said South Mountain lode against the application for patent for said Cliff lode mining claim.

4. The Supreme Court of the State of Utah erred in deciding that the plaintiff in this action (brought in support of an adverse
63 claim pursuant to the requirements of Sec. 2326 of the Revised Statutes of the United States, based upon a junior location) could successfully assail the title of the defendant, James Farrell to his senior location, for which he was prosecuting an application for patent, solely by reason of the conflict area which had previously existed between the said senior location and a prior claim called the South Mountain, which had been abandoned and became forfeited.

5. The Supreme Court of the State of Utah erred in its decision construing Secs. 2319, 2320, 2322, and 2324 of the Revised Statutes of the United States, and by not giving proper effect and construction to Sec. 2326 of the Revised Statutes of the United States, as construed by the Supreme Court of the United States in Lavagnino *vs.* Uhlig, 198 U. S. 443, by holding in this action, brought in pursuance of said Sec. 2326, that the defendant's mining claim the Cliff, for which application for patent was then being prosecuted, was void as against the plaintiff's junior location, the Divide, solely because of a conflict area which was claimed to have existed at the time of the location of the said Cliff mining claim, between said Cliff claim and a subsequently forfeited claim called the South Mountain.

6. That the Supreme Court of the State of Utah erred in its opinion in assuming that the discovery of the Cliff mining claim was within the limits of the conflict area, the ground in controversy in this cause, and therefore within the boundaries of the South Mountain claim, there being no evidence or finding to support that contention.

7. The Supreme Court of the State of Utah erred in deciding in this cause, that by reason of the discovery of the Cliff lode having been within the South Mountain claim, subsequently forfeited, the Cliff location was void as against the Divide location.

8. The Supreme Court of the State of Utah erred in not remanding said cause to the District Court for a new trial.

64 UNITED STATES OF AMERICA, *ss:*

To James M. Lockhart, Administrator of the Estate of John G. Rhodin, Deceased:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, at Washington, within sixty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the Supreme Court of the State of Utah, at Salt Lake City, Utah, wherein James Farrell is the plaintiff in error and said

James M. Lockhart, administrator of the estate of John G. Rhodin, deceased, is defendant in error, to show cause, if any there be, why the said judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable William M. McCarty, Chief Justice of the Supreme Court of the State of Utah, this 24th day of October, 1906.

W. M. McCARTY,
Chief Justice of the Supreme Court of the State of Utah.

Service accepted and copy received this 24th day of October, 1906.

W. I. SNYDER,
BISMARCK SNYDER,
Attorneys for James M. Lockhart, Administrator of the Estate of John G. Rhodin, Deceased.

65 *Bond on Writ of Error.*

Know all men by these presents: That we, James Farrell, as principal, and W. V. Rice and W. W. Armstrong, of Salt Lake City, State of Utah, as sureties, are held and firmly bound unto the defendant, James M. Lockhart, Administrator of the Estate of John G. Rhodin, Deceased, in the full and just sum of three hundred dollars ($300.00) to be paid to said defendant, his certain attorneys, successors or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally by these presents.

Sealed with our seals and dated this 24th day of October, in the year of our Lord one thousand nine hundred six.

Whereas, lately in the Supreme Court of the State of Utah, in a suit pending in said court between James M. Lockhart, Administrator of the Estate of John G. Rhodin, Deceased, as plaintiff, and said James Farrell, as defendant, judgment was rendered against the said James Farrell, and the said James Farrell having obtained a writ of error and filed a copy thereof in the clerk's office of said court to reverse the judgment in the aforesaid suit, and a citation directed to the said James M. Lockhart, Administrator of the Estate of John G. Rhodin, deceased, citing and admonishing him to be and appear at a session of the Supreme Court of the United States, at Washington, on the 22d day of December, 1906.

Now, the condition of the above obligation is such, that if the said James Farrell shall prosecute the said writ of error to effect, and answer all damages and costs if he fail to make the said
66 plea good, then the above obligation to be void, else to remain in full force and virtue.

JAMES FARRELL. [SEAL.]
W. V. RICE. [SEAL.]
W. W. ARMSTRONG. [SEAL.]

STATE OF UTAH, *County of Salt Lake, ss:*

W. V. Rice and W. W. Armstrong, the sureties whose names are subscribed to the above undertaking, being severally duly sworn, each for himself says: That he is a resident and freeholder of Salt Lake County, State of Utah, and is worth the sum in said undertaking specified, over and above all just debts and liabilities, exclusive of property exempt from execution.

W. V. RICE.
W. W. ARMSTRONG.

Subscribed and sworn to before me this 24 day of October, 1906.
[NOT. SEAL.] HENRY S. EVANS,
Notary Public.

Approved October 24, 1906.
W. M. McCARTY,
Chief Justice of the Supreme Court of the State of Utah.

67 UNITED STATES OF AMERICA.

STATE OF UTAH, *County of Salt Lake, ss:*

I, H. W. Griffith, Clerk of the Supreme Court of the State of Utah, in pursuance of a Writ of Error allowed in the case wherein James Farrell, is Plaintiff in Error, and James M. Lockhart, Administrator of the estate of John G. Rhodin, deceased, is Defendant in Error, do return attached hereto a transcript of the record and proceedings had in said cause, together with a copy of the judgment, opinion and bond; also the original petition for a Writ of Error, Writ of Error, Citation, and Assignments of Error.

And I further certify that said transcript of the record and proceedings, judgment, opinion, and bond, are full, true and correct copies of the several originals now on file and of record in my office.

In Witness Whereof I hereunto set my hand and affix the seal of said Supreme Court of the State of Utah, this 3rd day of December, 1906.

[Seal Supreme Court, State of Utah.]

H. W. GRIFFITH,
Clerk Supreme Court of Utah.

Endorsed on cover: File No. 20,485. Utah supreme court. Term No. 170. James Farrell, plaintiff in error, *vs.* James M. Lockhart, administrator of the estate of John G. Rhodin, deceased. Filed December 14th, 1906. File No. 20,485.

SUPREME COURT of the UNITED STATES.

No. 170.

JAMES FARRELL,
Plaintiff in Error,

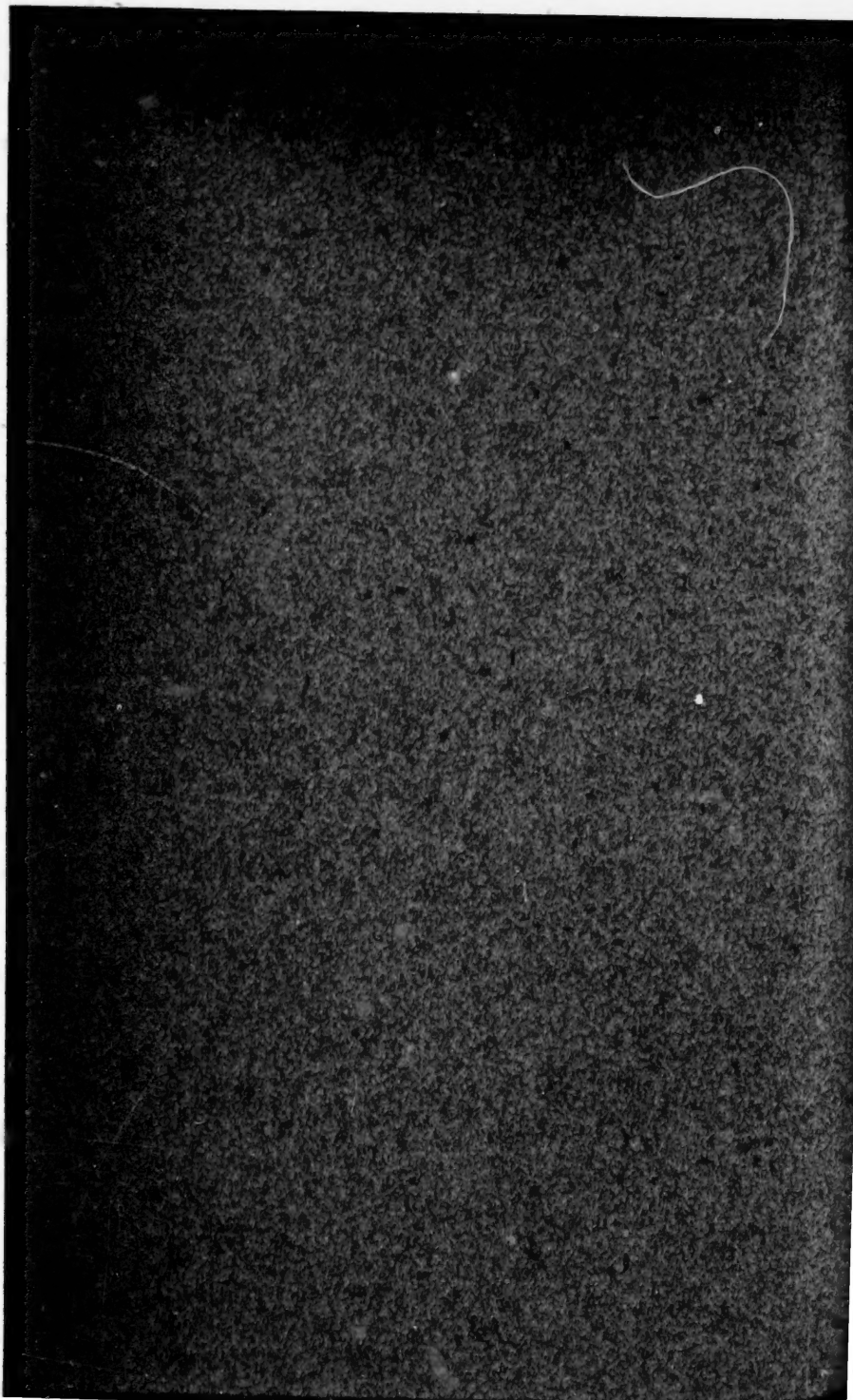
vs.

JAMES M. LOCKHART, Administrator
of the Estate of John G. Rhodes, Deceased,
Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

CHARLES C. DEY,
Attorney for Plaintiff in Error.

A. L. HOPPAUGH,
AND CHARLES C. DEY,
Of Counsel.



SUPREME COURT of the UNITED STATES.

No. 170.

JAMES FARRELL,
Plaintiff in Error,
vs.
JAMES M. LOCKHART, Administrator of the Estate of John G. Rhodin, Deceased,
Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT OF FACTS.

This suit was commenced in the District Court for Summit County, Utah, by James M. Lockhart as administrator of the estate of John G. Rhodin, deceased, in support of an adverse claim filed in the United States Land Office, pursuant to the provisions of Sec. 2326, Revised Statutes of the United States, (against the application of James Farrell for a patent for his Cliff Lode) claiming to be the owner of the Divide Lode Mining Claim and praying that he be decreed the owner and entitled to the possession of the area in conflict with the Cliff Lode Mining Claim.

In the complaint it is alleged (R. p. 2-4) that John G. Rhodin died intestate on March 21st, 1905; also alleged the appointment and qualification of the plaintiff, James

M. Lockhart, as administrator. It is also alleged that on and since the second day of January, 1903, "plaintiff through his predecessor and grantor, was, ever since has been, and now is the owner (subject only to the paramount title of the United States) and in the possession and entitled to the possession, by virtue of the discovery of mineral thereon and location thereof according to law, made on the 2nd day of January, 1903, and by duly marking the boundaries and doing all the acts required by law and the rules and regulations of the Uintah Mining District, Summit County, Utah, of that certain lode mining claim known as the Divide, situate in said Uintah Mining District," then follows a description. It is further alleged that an annual expenditure of not less than one hundred dollars had been made in labor and improvements upon said claim, also that the defendant, claiming to be the owner of a certain adjacent mining claim known as the Cliff, did on or about the 17th day of October, 1904, cause said Cliff mining claim to so be surveyed as to cross upon and overlap said Divide and to include the portion thereof described in said complaint. That on February 1, 1905, defendant filed field notes and diagram of said survey for said Cliff, together with an application for a United States patent for said claim in the United States Land Office at Salt Lake City, Utah, and caused the Register to give notice. That the plaintiff on the 3rd day of April, 1905, during the sixty days of publication filed in said Land Office under oath, an adverse claim to said application for patent showing the nature, boundaries and extent of the adverse claim, that plaintiffs

brought this suit within thirty days from the filing of said adverse claim. It is also alleged that by said application for patent defendant wrongfully set up and alleged that he was the owner of said Cliff Mining claim, being the whole of said Divide claim.

To this complaint the defendant, James Farrell, answered (R. p. 6-7), denying the allegations in respect to the location, existence and ownership of the Divide, also denying that he wrongfully set up and alleged ownership of the Cliff including the premises described in the complaint, and for a further and separate answer and defense and by way of affirmative relief it is alleged that ever since the 1st day of August, 1901, the defendant has been and still is the owner subject only to the paramount title of the United States and in the possession and entitled to the possession of the whole and every part of the Cliff Lode Mining Claim, being Survey No. 5312, describing the same. That the premises described in the complaint as the conflict area have ever since the location of the Cliff Lode Mining Claim constituted and do constitute a part of the Cliff Mining Claim and belong to the defendant as the owner of the Cliff Lode claim. That the plaintiff has no right, title or interest in or to the Cliff claim or any part thereof or to the part described in the complaint and the plaintiff's adverse claim is wrongful and without right and praying that defendant be adjudged to be the owner of the Cliff Lode Mining Claim, including the premises set forth in the complaint as the alleged conflict area.

To this answer plaintiff replied admitting the citizenship of defendant and denying each and every other allegation. (R. p. 8.) The cause was transferred from Summit to Salt Lake County for trial (R. p. 9), and was tried by the court upon the oral and documentary evidence admitted by the court and also at the same time the court considered the following proposed amendment to the plaintiff's reply, to-wit: (R. p. 18, 19.) "Alleges that at the time and date of the attempted location of said Cliff Mining Claim, the ground thereon contained was not any part of the open and unclaimed mineral land of the United States, but on the contrary the whole thereof, including the point and place of discovery of said alleged Cliff Mining Claim was then embraced and included and contained in a valid and subsisting mining claim, called the South Mountain, then and there the property and in the possession of the predecessors of this plaintiff's intestate; and for the reason that the discovery of said alleged Cliff Mining Claim was not placed upon unoccupied and unclaimed land of the United States, the alleged location based thereon became absolutely void." The District Court made its findings of fact and conclusions of law (R. p. 9-12) the court found that the deponent, James Farrell, is and ever since the first day of August, 1901, has been the owner (subject only to the paramount title of the United States) in the possession and entitled to the possession of the Cliff Lode Mining Claim, also found specifically the acts constituting a valid location of said claim, and that work had been done and improvements made by defendant each year since the location including

the year 1905 of the value of more than one hundred dollars. The court also found that after the location of said Cliff Mining Claim and on the 2nd day of January, 1903, said John G. Rhodin located the Divide Mining Claim by performing the acts required by law and performing the required annual labor; it is also found that on October 17th, 1904, James Farrell caused the Cliff to be surveyed for United States patent, and on February 1, 1905, duly applied for patent, also that on April 3rd, plaintiff filed an adverse claim to said application for and on behalf of the Divide Mining Claim, and on May 2nd, 1905, commenced this suit in support of his adverse claim. The 8th finding of the court is as follows: (R. p. 10-11.) "That upon the trial of said action plaintiff offered evidence (subject to the objection of the defendant that the same was incompetent, immaterial and irrelevant, and that no adverse claim was filed on behalf of the South Mountain Lode Mining Claim) tending to show that during the month of August, 1900, the ground in controversy herein was located by W. I. Snyder and Thomas Roscamp, respectively, citizens of the United States, under the name of the South Mountain Lode Mining Claim, that a discovery of a vein was made, and notice of location posted, and the boundaries of said claim marked so that the same could readily be traced, and that said notice was in due form and was duly recorded in the office of the County Recorder of Summit County, State of Utah. That no work was ever done upon said South Mountain Claim, and that said South Mountain claim lapsed and became forfeited for want of work done thereon on December 31st, 1901.

That no adverse claim was filed on behalf of said South Mountain Lode against the application for patent for said Cliff Lode Mining Claim. That on or about the 13th day of October, 1902, said Snyder and Roscamp made a deed purporting to convey said alleged South Mountain Lode Mining Claim to said John G. Rhodin." The court further found that the Cliff, Divide and South Mountain claims as located covered substantially the same ground, and that the place of discovery of the Cliff Mining Claim, was within the boundaries of the alleged South Mountain Claim.

As conclusions of law the trial court found that the defendant was the owner and in the possession of the Cliff Mining Claim. That said claim was a valid mining claim embracing and including the premises described, that the plantiff had no right, title or interest in said premises or any part thereof and thereupon a decree was entered accordingly. (R. p. 12-13.)

In due time the plaintiff prosecuted an appeal to the Supreme Court of the State of Utah (R. p. 23, 24,) the appeal was prosecuted upon the judgment roll, although for some reason we fail to comprehend plaintiff's counsel caused a so called bill of exceptions embodying the judgment roll to be made manifest so that we find in duplicate in the Transcript of Record, the pleadings, findings, decree, etc., none of the evidence was incorporated in the bill of exceptions.

In the Supreme Court of Utah, the plaintiff and appellant in substance assigned as errors (R. p. 1) that as

the Cliff claim was located and its discovery placed within the boundaries of the South Mountain "before there had been any abandonment or forfeiture of said South Mountain for non-performance of assessment work * * * the court erroneously adopted the conclusion of law that defendant having the older location as between the Cliff and Divide is entitled to the area in conflict, regardless of the fact that his discovery was placed upon a then valid and subsisting claim."

The Supreme Court of the State of Utah reversed the judgment of the court below, and directed judgment to be entered in favor of the plaintiff and appellant decreeing to him the possession of the ground. (R. p. 25.)

The defendant and respondent, James Farrell, thereupon caused this suit to be brought to this court by writ of error to the Supreme Court of the State of Utah. (R. p. 32-39.)

ASSIGNMENT OF ERRORS RELIED UPON.

1. The Supreme Court of the State of Utah erred in reversing the judgment and decree of the District Court, and in decreeing to the appellant in said cause the possession of the ground in controversy.

2. The Supreme Court of the State of Utah erred in its decision in this cause in not giving effect to Secs. 2325 and 2326, Revised Statutes of the United States, by deciding, in substance, that the location of the Cliff mining claim by James Farrell August 1, 1901, was void as

against the location of the Divide mining claim, made January 2, 1903, to the extent of the conflict area between them, because of the existence of a location called the South Mountain mining claim, made on August 21, 1900, covering said conflict area, notwithstanding said South Mountain claim became abandoned or forfeited December 31, 1901, and that no work had ever been done upon the same, as required by law, and no adverse claim was filed on behalf of said South Mountain claim against the application by James Farrell for a patent for his Cliff mining claim.

3. That the Supreme Court of the State of Utah erred in admitting into its consideration of this cause as material, competent, and relevant, the facts found by the trial court in its eighth finding of fact, to-wit:

> "That upon the trial of said action plaintiff offered evidence (subject to the objection of the defendant that the same was incompetent, immaterial and irrelevant, and that no adverse claim was filed on behalf of the South Mountain lode mining claim) tending to show that during the month of August, 1900, the ground in controversy herein was located by W. I. Snyder and Thomas Roscamp, respectively, citizens of the United States, under the name of the South Mountain lode mining claim. That a discovery of a vein was made, and the boundaries of said claim marked so that the same could readily be traced, and that said notice was in due form and was duly recorded in the office of the County Recorder of Summit County, State of Utah. That no work was ever done upon said South Mountain claim, and that said South Mountain claim lapsed and became forfeited for want of work thereon, on December 31, 1901. That no adverse claim was filed on

behalf of said South Mountain lode against the application for patent for said Cliff lode mining claim."

4. The Supreme Court of the State of Utah erred in deciding that the plaintiff in this action (brought in support of an adverse claim pursuant to the requirements of Sec. 2326 of the Revised Statutes of the United States, based upon a junior location) could successfully assail the title of the defendant, James Farrell, to his senior location, for which he was prosecuting an application for patent, solely by reason of the conflict area which had previously existed between the said senior location and a prior claim called the South Mountain, which had been abandoned and became forfeited.

5. The Supreme Court of the State of Utah erred in its decision construing Secs. 2319, 2320, 2322, and 2324, of the Revised Statutes of the United States, and by not giving proper effect and construction to Sec. 2326 of the Revised Statutes of the United States, as construed by the Supreme Court of the United States in Lavagnino vs. Uhlig, 198 U. S. 443, by holding in this action, brought in pursuance of said Sec. 2326, that the defendant's mining claim, the Cliff, for which application for patent was then being prosecuted, was void as against the plaintiff's junior location, the Divide, solely because of a conflict area which was claimed to have existed at the time of the location of the said Cliff mining claim between said Cliff claim and a subsequently forfeited claim called the South Mountain.

6. The Supreme Court of the State of Utah erred in deciding in this cause, that by reason of the discovery of the Cliff lode having been within the South Mountain claim, subsequently forfeited, the Cliff location was void as against the Divide location.

POINTS AND ARGUMENTS.

I.

This case is governed and controlled by Lavagnino vs. Uhlig, 198 U. S. 443.

We again restate the dates (R. p. 9-11), August, 1900, South Mountain located by Snyder and Roscamp.

August 1, 1901, Cliff located by James Farrell, plaintiff in error.

December 31st, 1901, South Mountain forfeited and abandoned.

October 13th, 1902, deed made of forfeited South Mountain claim to John G. Rhodin.

January 2nd, 1903, Divide located by John G. Rhodin.

February 1, 1905, application for patent of Cliff made.

April 3rd, 1905, adverse claim on behalf of Divide filed.

May 2nd, 1905, this suit brought in support of adverse claim.

No work was done for the benefit of or any adverse claim filed on behalf of the South Mountain.

The question presented here is whether, under the mining legislation of Congress, in this adverse proceeding, the application of James Farrell, plaintiff in error, for a patent of his Cliff claim can be successfully adversed

and defeated by defendant in error by virtue of the junior location, the Divide, upon the ground that at the time of the location of the Cliff claim on August 1, 1901, its discovery was within the limits of the South Mountain, which location or claim it is conceded and specifically found ceased to exist and became forfeited at the close of the 31st day of December, 1901, also that no work had been done for the benefit of said claim and no adverse claim filed on behalf thereof.

The question here presented is precisely the same as the question decided by this court in Lavagnino vs. Uhlig, 198 U. S. 443, the question there decided is stated as follows: (p. 453.) "The question then is, where there was a conflict of boundaries between the senior and junior location, and the senior location has been forfeited, has the person who made the relocation of such forfeited claim the right, in adverse proceedings, to assail the title of the junior locator in respect to the conflict area which had previously existed between that location and the abandoned or forfeited claim?"

The facts in that case briefly are, that on the 1st day of January, 1889, two mining claims were located, known as the Levi P. and the Veta, and at a later hour on the same day practically the same ground was covered by two locations known as Uhlig No. 1 and Uhlig No. 2. Both of said groups of locations were legally maintained by the separate locators until January 1, 1898. On the last named date the locators of the Levi P. and Veta mining claims, having failed to do the annual assessment work

on their said claims, abandoned the same. Immediately on said abandonment, to-wit, on the 1st day of January, 1898, a claim was located known as the Yes You Do. The claimants of the Uhlig No. 1 and Uhlig No. 2 applied for patent and the Yes You Do adversed such application. The Yes You Do attempted to defeat the Uhlig locations on the ground, among others, that at the time said Uhlig locations were made the same ground was covered by other prior and valid mining locations, viz: The Levi P. and Veta mining claims, and included the discoveries of both Uhlig No. 1 and Uhlig No. 2. The owner of the Uhlig claims contended that the location of the Levi P. and Veta mining claims did not prevent the location of the ground subsequently, and that on the abandonment of the Levi P. and Veta the ground enured to the benefit of said Uhlig locations.

In a comprehensive and exhaustive opinion the question received thorough consideration by this court and was decided in the negative, nor could the decision well have been otherwise under the provisions of Section 2326 of the Revised Statutes of the United States.

In view of that decision it does seem that the question here presented is no longer open to discussion and that the plaintiff in error, James Farrell, is lawfully entitled to a patent for the ground involved in this suit.

In this case, however, the Supreme Court of Utah has undertaken to distinguish this cause from Lavagnino vs. Uhlig upon the ground that in that case the discovery of

the Uhlig claims was not within the boundaries of the Levi P., one of the forfeited claims, but the record, in Lavagnino vs. Uhlig, shows that the plaintiff to defeat the defendant's application for patent of the Uhlig No. 1 and Uhlig No. 2, offered to show that the Levi P. and Veta mining claims, at the time of the location of the Uhlig No. 1 and Uhlig No. 2 were valid and subsisting claims and "covered the discoveries of both the Uhlig No. 1 and Uhlig No. 2." It also further appears from the plats, that while the discovery points were not in the Levi P. they were respectively in the Veta, which stood in the same relation as the Levi P. The contention that the discovery of the Uhlig claims was, at the time of the location of the Uhlig No. 1 and Uhlig No. 2, within the boundaries of the Levi P. and Veta claims was made in the record and briefs of counsel both in the Supreme Court of Utah and in this court, and was so understood by this court, for it is said at page 445, "For the same reason the trial court sustained an objection to evidence offered on behalf of the plaintiff tending to show that at the time the Uhlig claims were located the ground covered by such locations was then covered by prior locations, made at an earlier hour on the same day, and was consequently not subject to location as unoccupied mineral land of the United States."

The reason that no specific mention is made in the opinion, of the contention that the discovery of the Uhlig claims was at the time of the location of said claims within the boundaries of the Levi P. and Veta claims is obvious, for the grounds upon which that decision is predicated render the location of the discovery as claimed wholly immaterial.

Under the provisions of Section 2325, Revised Statutes of the United States, the principle is well settled, that if no adverse claim is filed within the time therein fixed, there is a conclusive and indisputable presumption that no adverse claim exists, so likewise under Section 2326 failure of adverse claimant to bring suit within the time specified is a waiver of his adverse claim.

The rule of law is clearly stated, referring to Section 2326 in Lavagnino vs. Uhlig, 198 U. S. 443, 455. "Thus clearly providing that if there be a senior locator possessed of paramount rights * * * he may abandon such rights and cause them in effect to enure to the benefit of the applicant for a patent by failure to adverse, or, after adversing, by failure to prosecute such adverse."

The true and logical deduction as applied to the question involved in that case and with equal force and effect applicable to the case at bar, is then stated as follows: (p. 456.) "And this result, flowing from the failure of the owner of a subsisting senior location to adverse an application for patent by the owner of the opposing location, or his waiver if an adverse claim is made, must, as the greater includes the lesser, also arise from the forfeiture of the claim of the senior locator before an application for patent is made by the conflicting locator and the consequent impossibility of the senior locator to successfully adverse after the forfeiture is complete."

As the senior locator acquires only a right of possession by virtue of his location, the legal title remaining in the United States, his forfeiture or abandonment of such right places him in a position where he cannot, successfully, contest the subsequent right of possession made by the junior locator. Nor can a third party assert such right. In Del Monte vs. Last Chance, 171 U. S. 55, 77, it is said, "The statute does not provide, and it cannot be contemplated that he is not to act until by judicial proceedings it has become established, that the prior location is invalid or has failed before he makes a location. He ought to be at liberty to make his location at once, and thereafter in the manner provided by the statute, litigate, if necessary, the validity of the other as well as that of his own locations." Also at p. 83, 84, "And while in the adjustment of those conflicts the rights of the first locator to the surface within his location, as well as the veins beneath his surface, must be secured and confirmed, why should a subsequent location be held absolutely void for all purposes and wholly ignored? Recognizing it so far as it establishes the fact that the second locator has made a claim and in making that claim has located parallel end lines, deprives the first locator of nothing. Certainly, if the rights of the prior locator are not infringed upon, who is prejudiced by the awarding to the second locator all the benefits which the statute gives to the making of a claim?"

The case of Lavagnino vs. Uhlig places a construction upon Section 2326 of the Revised Statutes of the United States, clearly not in conflict with the earlier cases

in this court referred to in the opinion of the Supreme Court of Utah in this case.

The question presented here and in Lavignino vs. Uhlig was not involved in the decisions referred to.

Del Monte vs. Last Chance, 171 U. S. 55, 78.

II.

The case of Brown vs. Gurney, 201 U. S. 184, is clearly distinguishable from this case, and the case of Lavagnino vs. Uhlig, 198 U. S. 443.

The Supreme Court of Utah held that this case is controlled by Brown vs. Gurney. We submit that the case of Brown vs. Gurney, when properly understood, is clearly distinguishable from the case of Lavagnino vs. Uhlig, and has no application to this case.

In Brown vs. Gurney the question was, which of three lode claim locations, namely, the Scorpion, the Hobson's Choice, or the "P. G." was valid.

The Scorpion was located May 13th, 1898. The Hobson's Choice, June 23rd, 1898. The "P. G.," July 15th and 16th, 1898.

Prior to June 14th, 1898, the owners of a lode claim called the Kohnyo Claim, had applied for a patent for the claim and in the application had proceeded to and had in fact made *final entry* and had received the Receiver's Certificate in payment of the land.

The claim consisted of a tract of land 1,200 feet in length, which was cut in twain, by a placer mining claim called the Mt. Rosa Claim. After final entry had been

made as aforesaid, but before the patent was issued, the Land Department decided that patent ought not to be issued for the whole tract embraced in the Kohnyo claim. That the *final entry ought to be cancelled,* with the proviso, however, that the owners of the Kohnyo might, if they should so elect, have the final entry stand, and they might have patent for, either the north 500 feet, or the south 700 feet of the 1,200 feet, as they might elect, within sixty days. On the 14th of June, 1898, the owners of the Kohnyo, made election to take and hold under their final entry the north 500 feet of the 1,200 feet of their claim aforesaid.

The Scorpion claim was located on the south 700 feet on the 13th of May, 1898, or one month before the Kohnyo claimant made his election as aforesaid.

The Hobson's Choice located the south 700 feet of the Kohnyo entry on the 23rd of June, 1898, or nine days after the Kohnyo owners made their election as aforesaid.

The "P. G." claimant made his location on the south 700 feet July 16th, 1898, or 23 days after the Hobson's Choice was located.

Under this state of facts Brown vs. Gurney decides that the Kohnyo claimant had a patent right, in either the north 500 feet, or the south 700 feet, as he might elect, within the sixty days aforesaid. That therefore, until the sixty days should expire for said election, or until the election within the sixty days should be made, neither part of the said tract was subject to location.

On principle the case stood, as if the Kohnyo claimant had a patent for the whole tract, and the government had brought a suit for the cancellation of the patent, or for a cancellation *pro tanto*. In such case the land is not open to location until the patent has been set aside and the final entry cancelled.

In this case it was held, that the final entry was cancelled on the 14th day of June, 1898, the date of the election by the Kohnyo claimant to take the north 500 feet of the claim. And that then the south 700 feet being freed from the Kohnyo entry, became a part of the public domain, and open to location.

That the location of the Scorpion of May 13th, 1898, was premature, and therefore invalid. That the location of Hobson's Choice, made June 23rd, 1898, was made *after the cancellation of the Kohnyo entry*, and was therefore valid.

That the "P. G." location was made after the valid Hobson's Choice and therefore was invalid.

It has always been held, and it is a legal and logical necessity, as obvious without authority as with it, that when for any cause, a patent to government lands has been cancelled, the lands embraced in the patent, are restored to the public domain, and therefore, subject to reentry. This is the substance only, of the decision in Brown vs. Gurney.

Lavagnino vs. Uhlig, and this case, rests upon a different state of facts and a different legal title, and is therefore governed by different principles.

Lavagnino vs. Uhlig determined the relation of once conflicting possessory titles upon the public domain, where one of such titles had been forfeited or abandoned,

as the same are controlled by a true construction of the Revised Statutes of the United States.

In Brown vs. Gurney, the court dealt with a title, which was the same as patented, and therefore, a title whose subsequent devolution was no longer subject to the statutes governing then or once conflicting possessory titles.

The succession to the title, upon the cancellation of a patent, in law and in logic must stand upon a different footing, from that of a once conflicting possessory title, where there has been either an abandonment, or forfeiture of one of such one time conflicting possessory titles. This distinction though not expressly recognized in either of these decisions, will, we believe, be some time distinctly and emphatically expressed.

It is respectfully submitted that the judgment and decree directed by the Supreme Court of Utah should be reversed and the judgment and decree of the District Court should be affirmed.

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SUPREME COURT of the UNITED STATES.

OCTOBER TERM, 1907.

JAMES PARRELL,
Plaintiff in Error,
vs.
JAMES M. LOCKHART, Administrator of the Estate of JOHN G. RHODIN, Deceased,
Defendant in Error.
No. 170.

BRIEF OF DEFENDANT IN ERROR.

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SUPREME COURT of the UNITED STATES.

OCTOBER TERM, 1907.

JAMES FARRELL,
Plaintiff in Error,
vs.
JAMES M. LOCKHART, ADMINISTRATOR OF THE ESTATE OF JOHN G. RHODIN, DECEASED,
Defendant in Error.

No. 170.

BRIEF OF DEFENDANT IN ERROR.

STATEMENT.

By his writ of error the plaintiff in error seeks to reverse the judgment of the Supreme Court of Utah, reversing the judgment and decree of the Third Judicial District Court of said State, in and for Summit County, in an adverse suit.

In the District Court the defendant in error, as plaintiff, prosecuted his suit in support of an adverse claim filed in the U. S. Land Office at Salt Lake City against the application by plaintiff in error for patent for the Cliff Mining claim.

The defendant in error is the owner of the Divide mining claim and adversed the Cliff with that. He is also the owner of the South Mountain, but he did not adverse the application with that, though he relied upon it to defeat the claim of plaintiff in error, because the South Mountain was a valid subsisting claim when the Cliff was located, and embraced all the unpatented ground covered by the Cliff, including the point and place of discovery upon which the Cliff location depended. The dates of the important acts are as follows:

South Mountain, located August 21, 1900, was a valid claim during the entire year 1901, and thereafter until a proper location of the ground was made.

Cliff, located August 1, 1901.

Divide, located January 2, 1903.

South Mountain conveyed by locators to plaintiff's intestate October 13, 1902.

Both the Cliff and Divide have been sufficiently represented by annual labor each year since their respective locations.

Plaintiff in error applied for patent for the Cliff February 1, 1905.

On April 3, 1905, within sixty days from first publication of notice, adverse claim filed by plaintiff.

May 2, 1905, suit in support thereof commenced.

By finding 9 (Trans. p. 11), the trial court found:

> "That the said Cliff, Divide and South Mountain claims, as located, cover substantially the same ground, and that the place of discovery of said Cliff lode mining claim was within the boundaries of said alleged South Mountain mining claim."

It will be observed that the description calls of the conflict (Trans. p. 3) follow the lines of surveyed (presumably patented) claims on all sides.

The South Mountain was located August 21, 1900, and the owners were not required to do any assessment work thereon, until 1901, and had the whole of that year in which to do it.

R. S. U. S. 2324;
Act June 22, 1880, 21 Stat. L., p. 61.

ARGUMENT.

I.

A LOCATION SEGREGATES THE LAND EMBRACED FROM THE PUBLIC DOMAIN.—PREMATURE RELOCATION.

A location made and completed according to law partakes, in all its essential features, of the characteristics and incidents of a grant from the United States of the land included within the location.

Gwillim v. Donellan, 115 U. S. 45;
Baxter Mountain G. M. Co. v. Patterson, 3 N. M. 179, 3 Pac. Rep. 741;
Butte City Smoke House Lode Cases, 6 Mont. 312;
Wills v. Blain, 4 N. M. 378, 20 Pac. Rep. 795;
Renshaw v. Switzer, 6 Mont. 464, 13 Pac. Rep. 127;
Garfield M. & M. Co. v. Hammer, 6 Mont. 83;
Belk v. Meagher, 104 U. S. 769;
Sullivan v. Iron S. M. Co., 143 U. S. 431;
State ex rel. v. Court (Mont.), 61 Pac. 882;
Mannel v. Wolf, 152 U. S. 505.

In Mannel v. Wolf, *supra,* this court, speaking through the present Chief Justice, said:

> "When such qualified persons have made discovery of mineral lands and complied with the law, they have the exclusive right to possession and enjoyment of the same. It has, therefore, been repeatedly held that mining claims are property in the fullest sense of the word, and may be sold, transferred, mortgaged and inherited without infringing the title of the United States, and that when a location is perfected it has the effect of a grant by the United States of the right of present and exclusive possession. * * *."

And as said in New Mexico by Mr. Chief Justice Axtell:

> "A location of a mining claim when perfected has the effect of a grant from the United States of the right to present and exclusive possession and enjoyment of all the surface included within the lines of the location."
>
> Baxter Mt. G. M. Co. v. Patterson, 3 N. M. 179.

And by Mr. Chief Justice Wade of Montana:

> "A valid location of a quartz mining claim on the public mining lands of the United States is a grant from the government to the locator thereof, and carries with it, by compliance with the law * * * a full and complete title; * * * after such a location, the lands included within its boundaries are withdrawn from sale and preemption; that the patent relates back to the location when issued, and is the consummation of the grant which by the location had its inception; * * a valid location kept alive by representation and a compliance with law gives to

> the locator, or his grantees, the right to the exclusive possession and enjoyment of the surface of the claim located."
>
> Butte City Smoke House Lode Cases, 6 Mont. 397, 12 Pac. Rep. 858.

Therefore, while this location of the South Mountain claim was valid and subsisting, its territory could no more be invaded for the purpose of attempting a location, than could patented ground be so encroached upon.

> "A mining claim perfected under the law is property in the highest sense of that term."
>
> Forbes v. Gracey, 94 U. S. 767;
>
> Belk v. Meagher, 104 U. S. 279.

> "There is nothing in the act of Congress which makes actual possession any more necessary for the protection of the title acquired to such a claim by a valid location, than it is for any other grant from the United States."
>
> Belk v. Meagher, *supra.*

Recognizing the general rule, then, that possession is presumed to be with the legal title for the time being, it necessarily follows, that any invasion of that possession is a trespass.

> Atherton v. Fowler, 96 U. S. 513;

No legal right can be created which depends for its validity upon a trespass.

> Atherton v. Fowler, 96 U. S. 513;
>
> Eilers v. Boatman, 3 Utah 159;
>
> Clipper M. Co. v. Eli M. & L. Co., 194 U. S. 220 (48 L. Ed. 944).

In the last case this court said:

"It will be seen that Sec. 2322 gives to the owner of a valid lode location the exclusive right of possession and enjoyment of all the surface included within the lines of the location. That exclusive right of possession forbids any trespass. No one without his consent, or, at least, his acquiescence, can rightfully enter upon the premises or disturb its surface by sinking shafts or otherwise. It was the judgment of Congress that, in order to secure the fullest working of the mine, and the complete development of the mineral property, the owner thereof should have the undisturbed possession of not less than a specified amount of surface. That exclusive right of possession is as much the property of the locator as the vein or lode by him discovered and located. In Belk v. Meagher, 104 U. S. 279, 283, 26 L. ed. 735, 737, it was said by Chief Justice Waite that 'a mining claim perfected under the law is property in the highest sense of that term;' and in a later case (Gwillim v. Donnellan, 115 U. S. 45, 49, 26 L. ed. 348, 349, 5 Sup. Ct. Rep. 1110, 1112), he adds * * And this exclusive right of possession and enjoyment continues during the entire life of the location or, in the words of Chief Justice Waite, just quoted, while there is 'a valid and subsisting location of mineral lands, made and kept up in accordance with the provisions of the statutes of the United States.' There is no provision for, no suggestion of, a prior termination thereof."

See also Belk v. Meagher, *supra*, in which the court says:

"As the United States could not at the time give Belk (the person who relocated before the original location was subject to forfeiture) the right to take possession of the property for the

purpose of making his location, because there was an outstanding grant of the exclusive right of possession and enjoyment, it would seem necessarily to follow that any tortious entry he might make must be unavailing for the purposes of a valid location of a claim under the act of Congress."

Belk v. Meagher, 104 U. S. 279.

This is not a case of mere overlapping claims, as was the Lavignino-Uhlig case, as decided by this court, but is a case where a premature attempt was made to relocate an entire, subsisting, valid claim by placing the discovery within the limits of the previously located ground.

Assignments of error numbered 4 and 5 are not addressed to the real situation.

The *entire area* of both claims was thus brought in conflict and it is quite outside of the real question for counsel to attempt to make of this a case of mere overlapping claims not involving the point of discovery. That is the very *crux* of this case. The discovery of the Cliff was placed upon a valid and *subsisting* mining claim, upon ground not then open to appropriation and therefore, there being no valid discovery there was no valid location.

Belk v. Meagher, 104 U. S. 279;
Book v. Justice M. Co., 58 Fed. 106-28;
Malone v. Jackson, 137 Fed. 878;
Hall v. Hale, 8 Colo. 351, 8 P. 580;
Shattuck v. Costello, 68 Pac. 529;
Slavonian M. Co. v. Perasich, 7 Fed. 331;
Brown v. Gurney, 201 U. S. 184;
Jordan v. Duke, 53 Pac. 197.

The language of this court in the Belk case is:

> "Mining claims are not open to relocation until the rights of a former locator have come to an end. A relocator seeks to avail himself of the mineral in the public land which another has discovered. This he cannot do until the discoverer has, in law, abandoned his claim and left the property open for another to take up."

Approved in Reynolds v. Pascoe, 24 Utah 219.

In Brown v. Gurney, 201 U. S. 184, this court, speaking through the present Chief Justice, said:

> "Of course it is essential that at the date of location the ground located should be a part of the public domain; and also says that the 'specific question affirmatively raised' by that case, 'was whether the ground in controversy was a part of the public domain at the time of the respective contested locations.'"

II.

THE IMPORTANCE OF DISCOVERY.

Any confusion, or seeming confusion, of thought between the Lavignino-Uhlig case, as decided by this court, and the other cases substantially upon the same footing, and essentially parallel in subject matter theretofore decided by this court, can be wholly accounted for by the single fact that in the Uhlig case the position of the discovery, this most essential prerequisite to a valid location, was not at all considered.

This court has not yet said that a valid location can be made by making and placing the discovery point, notice and monument, upon previously appropriated ground, upon which the pre-existing title or claim still remains in full force.

There is no principle more firmly established in the mining law than that discovery must precede location, and that every location to be valid must be based upon a valid discovery within the limits of the claim. The language of the statute is:

> "No location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim."
>
> R. S. U. S. 2320.

It constitutes the evidence provided by statute that the land is of the character which congress by this statute authorized to be taken up as a mining claim.

The text and case law on the subject speak with one voice, and substantially in the language of the statute.

> Creede & C. C. M. & M. Co. v. Uinta T. M. & T. Co., 196 U. S. 337-49 L. Ed. 501;
> Mining Co. v. Allman, 23 Utah 410-18;
> Harrington v. Chambers, 3 Utah 94;
> Hayes v. Lavignino, 17 Utah 185, 190-7;
> King v. Amy etc. Co., 152 U. S. 225;
> Erhardt v. Boaro, 113 U. S. 527;
> Perigo v. Erwin (Utah), 85 Fed. 904, S. C. 93 Fed. 608.

Nor is this a mere idealism. It is made by the statute to constitute the very basis of every valid mining claim.

In Creede etc. v. Uinta etc. *supra*, it was said by Mr. Justice Brewer, speaking for this court:

> "Three things are provided for: discovery, location, patent. The first is the primary, the initial fact. The others are dependent upon it, and are the machinery devised by Congress for securing to the discoverer of mineral the full benefit of his discovery."

When a party desires and seeks to avail himself (by relocation) of a discovery made by another, *he must wait until the rights of that other have terminated.*

> "A location, to be effectual, must be good at the time it is made. When perfected it has the effect of a grant by the United States of the right of present and exclusive possession. As the proceeding to locate is one in which the United States are not directly actors, but is carried on by the locator alone, so that he may take what the United States have, through an act of Congress, offered to give, it is clear that there can be nothing to take until there is an offer to give. Here Congress has said in unmistakable language, that *what has been once located under the law shall not be relocated until the first location has expired.*" (Italics ours.)
>
> Belk v. Meagher, 104 U. S. 279..

III.

LOCATION VOID IF DISCOVERY PLACED ON APPROPRIATED GROUND.

It is settled law, and there is nothing in the decision of this court in the Uhlig case, which in the slightest degree goes to the contrary; indeed, it is the rule laid down by all courts, that, "*the location of a mining claim is void when its discovery point is placed within an existing valid claim.*"

> Watson v. Mayberry, 15 Utah 265;
> Reynolds v. Pascoe, 24 Id. 219;
> Eilers v. Boatman, 3 Id. 159;
> Belk v. Meagher, *supra;*
> Gwillim v. Donnellan, 115 U. S. 45;
> Upton v. Larkin, 7 Mont. 449, 17 Pac. 728;
> Perigo v. Erwin, 85 Fed. 904.

This rule is followed and many additional cases collected in a late Colorado case.

Sullivan v. Sharp, 80 Pac. 1054.

REVIEW OF THE UHLIG CASE.

Counsel for plaintiff in error attempt to place this and the Uhlig case in the same class, and to distinguish them from Brown v. Gurney (201 U. S. 184) because, in that case the ground in controversy having been theretofore embraced in the Kohnyo, was withdrawn from the public domain until the cancellation of final entry of that claim became effective, while in the case at bar the claim upon which Farrell placed his discovery was held under a possessory title merely. We respectfully insist that this is a distinction without a difference. The location of the South Mountain, while still subsisting, was as effectual to prevent the initiation of rights by trespass upon it, as was the application for patent, and final entry thereon, by the Kohnyo. Both were good until annulled by some act, positive or negative, sufficient in law to defeat them.

Belk v. Meagher, 104 U. S. 279;
Reynolds v. Pascoe, 24 Utah 219;
Little Pittsburg M. Co. v. Amie M. Co., 17 Fed. 57;
Erwin v. Perigo, 93 Fed. Rep. 608;
Tuolumne Cons. M. Co. v. Maier, 134 Cal. 583;
Branagan v. Dulamy, 2 L. D. 744, Re Williams, 20 L. D. 458;
Sullivan v. Sharp, 33 Colo. 346; 80 Pac. Rep. 1054.

On page 18 of their brief counsel say that it was decided by this court "that the 'P. G.' location was made after the valid Hobson's Choice, and therefore was invalid." True, and paraphrasing this language to fit this case, we find "that the Cliff location was made after the valid South Mountain, and therefore was invalid."

We think that the more carefully one examines the Uhlig case, the more apparent it is that it and this case are not parallel.

In the Lavagnino-Uhlig case, the opinion of Mr. Justice White is indubtitably predicated upon the theory that the junior and senior locations of which he speaks, are both valid locations, i. e., locations having their discoveries well placed upon vacant ground, and, that, whatever conflicts exist between them, are those, and those only, resulting from conflicting boundaries. Observe this further significant language:

> "The question then is, where there was a conflict of boundaries between a senior and junior location, and the senior location has been forfeited, has the person who made the re-location of such forfeited claim the right, in adverse proceedings, to assail the title of the junior locator in respect to the conflict area which had previously existed between that location and the abandoned or forfeited claim?"
>
> Lavagnino v. Uhlig, 198 U. S. 443, 453.

And the opinion decides, and only decides, that in cases of conflicting boundaries, conflicting areas, between locations otherwise good, the senior one before the court takes the conflict area, regardless of the fact that the same area, not embracing the discovery, was within an

existing claim at the time of location of the senior claim, and is also within the junior claim before the court.

Taking up again the question presented by the quotation last above made from the opinion of Mr. Justice White, and assuming that it states the question decided fully, the result of the decision, at most, is this: That the junior claimant before the court has not the right to assail the senior claimant's title to an *area* claimed by both, solely upon the ground that such *area* was within the boundaries of an existing valid claim at the time the senior claim was located. But the court did not say, and the question was not decided which is here presented, namely, *that where the junior locator assails the whole claim of the senior locator, and the existence of his claim and its validity as a mining claim, because entirely placed upon appropriated ground*, he may not do so because such pre-existing claim (the South Mountain in this case) is not before the court as a party adversing the defendant (plaintiff in error here), the senior locator.

A party properly in court, making a claim for himself, and assailing the claim of his adversary, is interested in showing, and may lawfully show, any competent fact which tends to defeat, destroy or render nugatory, the claim of his adversary.

> Del Monte M. & M. Co. v. Last Chance M. & M. Co., 171 U. S. 55-77.

As said by Mr. Justice Straup in the Supreme Court of Utah in this case:

> "Suppose respondent (plaintiff in error) had located mineral lands when it was within a reservation and not subject to location, and, after it had been

> opened to location, the appellant (defendant in error) had located the same ground, could it be said that the respondent had the better right to its possession because of his prior location? Would it not at once be said that his location was absolutely void, and that no right had been acquired by him, and that, in a contest between himself and appellant, respondent's attempted location would be no obstacle to a valid location of the ground made by appellant after it had been opened to the public and become subject to location? In such case respondent's location would be a nullity and just as if it had never been made." (See record herein, page 29.)
>
> Kendall v. San Juan Mining Co., 144 U. S. 658;
> Brown v. Gurney, 201 U. S. 184.

In such case it is manifest that the junior claimant has the right to show, as was done in the San Juan case, and the Gurney case, that the senior locator's claim failed because prematurely made. The additional distinction between this case and the Lavagnino-Uhlig case is found in the fact that in that case the plaintiff, the owner of the "Yes You Do," had lost his standing in court for all purposes, by himself presenting what the court decided was a void location. Here no such question is presented; the defendant in error (plaintiff below) has a valid location made by a competent person and is therefore properly in court at all stages of the proceedings, and competent to raise all proper questions, including the invalidity of his adversary's title, which fact is duly pleaded by him. It would scarcely be contended, we submit, that the junior locator, the plaintiff below and defendant in error here, might not under proper plead-

ings raise either of the points that the senior locator's claim (that of the plaintiff in error) was void because he had not in fact made a discovery, or had not marked the boundaries, or had not recorded his claim, where record is required by state or local law, and upon a proper showing defeat his adversary's claim upon any one of these grounds. Therefore, so long as he has any standing in court, he may raise the question here raised, that the ground sought to be located by the plaintiff in error was, at the date of location, all claimed, including the point and place of his (plaintiff in error's) discovery, by a valid subsisting claim, and that the pretended location of the Cliff claim is void, because the discovery thereof was placed on ground not then open to location. Hence the ground of objection made here, namely, that no adverse claim was filed on behalf of said South Mountain claim and that, consequently, the plaintiff (defendant in error) canot raise the question of the validity of defendant's (plaintiff in error's) location raises no material question, and the trial court errod as decided by the Supreme Court of Utah, in not overruling the objection and in not basing the judgment upon the rejected finding.

From the foregoing, as well as the further statements herein, it follows that it will be enough to accord to the Uhlig case the merit and force which are intrinsically produced from its own circumstances and invironments, as solely a case of overlapping claims, and as not deciding, even if involving in any way, the question of discovery. Even then, the rule thereby announced to the effect that the *area in conflict* between two overlap-

ping claims, *the discovery not being involved,* passes to the junior, without an amended location, upon the lapsing of the senior, is contrary to the rule theretofore adopted by western courts and lawyers; but it must not be overlooked that this is the length and breadth of the decision.

The positions of the discovery points of the Uhlig claims, if it can be said they were in any way raised or involved, were only incidentally presented, and were not considered by the court in any way, except that the subject was mentioned in two or three cases quoted from by Justice Baskin in the Utah Supreme Court, and upon the subject itself he expressed no opinion, while in the opinion of Mr. Justice White in this court the subject was not mentioned. If this question had been or could have been raised in the lower court and urged upon the Supreme Court, the result may have been different. However, for the purpose of comparison and distinction, it is enough to say that because the question of the position of the discovery was neither raised, ascertained nor passed upon finally, the case itself is neither parallel with this nor authority for the position taken by the plaintiff in error in this case. It cannot be that the court in the Uhlig case intended to inaugurate the system of scramble so forcibly depicted by this court in the Belk case, in the following language:

> "To hold that an entry may be made and the several acts done necessary to perfect a re-location, before the former location has expired, will be to encourage unseemly contests about the possession of the public mineral-bearing lands, which would almost necessarily be followed by breaches of the peace."
>
> Belk v. Meagher, 104 U. S. 279.

Any doctrine which permitted a location to be made upon an existing location, would certainly be productive of endless mischief.

If a tentative location can be placed upon a live location, to take effect at the end of the other, or in case it terminates, it merely opens wide the door for endless trespasses.

Further reviewing the Uhlig case we take the liberty to quote a very strong and able paragraph from a recent review of that case in a note to 68 L. R. A., pp. 833, 843.

> "The court starts with the postulate that Sec. 2326 of U. S. Rev. Stat., U. S. Comp. Stat. 1901, p. 1430, clearly recognizes that a patent may issue to a junior locator if the senior locator fails to adverse, or, after adversing, fails to prosecute his adverse; and that it cannot be denied that under Sec. 2326, if before the abandonment or forfeiture of the senior claim the owners of the junior locations had applied for a patent, and the owners of the senior location had not adversed the application, upon an establishment of a prima facie right in the owners of the junior claims, an indisputable presumption would have arisen that no conflict claims existed to the premises described in the location notice. The court then concludes, a fortiori, that the same must be true if the senior location is forfeited before the junior locator's application for a patent, thus rendering it impossible for the senior locator to successfully adverse. It is submitted, with all deference, that this conclusion is a *non sequitur*. The reason a patent would have issued to the junior locator in the hypothetical case assumed by the court (i. e., the case of a senior location subsisting at the time the junior loca-

tor's application for a patent was made, no adverse having been filed or prosecuted by the senior locator) is suggested by the court's own statement that in such case, upon the establishment of a prima facie right in the owners of the junior claims, an indisputable presumption would have arisen that no conflict claims existed to the premises described in the location notice. In other words, the patent issues to the junior locator in the hypothetical case because, so far as it appears in the proceedings before the authorities of the land office, there is no senior location conflicting with the junior location. The assumption, in the hypothetical case, of a senior location conflicting with the location upon which the application is based, can properly have reference only to the facts as they actually exist, and as they may elsewhere, and upon some other occasion, appear, and not to the facts as they appear before the authorities of the land office at the time of the proceedings upon the junior locator's application, since, *ex hypothesi* (there being no adverse), there is nothing to show the existence of any conflicting senior location, and *quoad* the application there is no conflicting senior location. The only sense in which Sec. 2326 can properly be said to contemplate the issuance of a patent to the junior locator, notwithstanding a subsisting senior location covering the same ground or part of the same ground, is that in case of the failure of a senior locator to file an adverse, or, having filed it, to prosecute it, the authorities of the land office will indulge the presumption that there is no conflicting claim, and after the time for filing the adverse it is too late to show the contrary. This is analogous to a statute authorizing a judgment for plaintiff in an action upon a contract, in case the defendant fails to answer or, having answered, withdraws his answer. It is true that as a practical re-

sult of such statute the plaintiff may recover a judgment against defendant, although as a matter of fact the latter was not a party to the contract at all; but this is so, not because the statute contemplates that plaintiff may take judgment against a person who was not a party to the contract, but because, upon the showing before the court, the defendant was a party to the contract and is estopped, so long as the judgment stands, to affirm the contrary.

"It will be observed that in the hypothetical case assumed by the court in its argument (i. e., the case of a subsisting senior location at the time of the junior locator's application) the senior locator is the only person who has any right or interest, to file an adverse; and if he does not file an adverse, or, having filed one, fails to prosecute it, there is nothing to rebut the junior locator's prima facie case, or to show the existence of a conflicting senior location. When, however, the senior location has been forfeited and re-located prior to the junior locator's application for a patent, the relocator has an interest in showing that at the time of the junior location the ground was already covered by a senior location, and therefore was not at that time subject to location, and consequently was subject to re-location by him after the forfeiture of the senior location, notwithstanding the intervening junior location.

"It is true that a re-location dates only from the time it is made, and does not relate back to nor retain any of the rights of the original location upon the abandonment or forfeiture of which it is based; but that fact should not preclude the relocator from showing, as one of the conditions upon which the validity of his re-location depends, that at the time the junior location was made the ground was already covered by a subsisting senior location, and that in consequence

the junior location opposed no obstacle to the valid re-location of the ground after the forfeiture of the senior location.

"It is submitted, with all deference, that the possibility under Sec. 2326 that a patent may issue to a junior location notwithstanding a subsisting senior location, the owner of which fails to file an adverse, or, having filed one, fails to prosecute it, arising, as that possibility does, from the existence in such case of a presumption that there are no conflicting claims to the premises described in the junior locator's notice, affords no substantial support for the conclusion that in case of the forfeiture and re-location of the senior location prior to the junior locator's application for patent, the re-locator cannot successfully adverse the application; since by his adverse the re-locator proposes to show the existence of facts which rebut the presumption, namely, that at the time the junior location was made there was a conflicting senior location, and that after the forfeiture of the senior location the ground was re-located by him.

"The court, referring to the position taken by the text writers contrary to the doctrine of this decision, said that, when the cases to which they refer as sustaining their position are examined, it will be seen that they were decided either before the passage of the adverse claim statute in 1872, or concerned controversies between senior and junior locators, or were dependent upon the provisions of state statutes.

None of these alternatives, however, is true of Belk v. Meagher, 104 U. S. 279." (Italics our.)

The foregoing review comes with all the force and strength of a law writer having the single purpose in view of marking down the true rule of the law without reference to any particular case. It is most apposite

to this case, as it presents the matter from a disinterested view point; and as it fits the case at bar so exactly it stands largely in the position of the statement of *amicus curiae*.

The position of plaintiff in error, which he claims is taken by this court in Lavagnino v. Uhlig, that the presumption which Sec. 2325 authorizes the land department to indulge, is strong enough to warrant the court in saying that because no adverse is filed by the South Mountain, no such claim exists, is indefensible. By such a construction of the statute too much stress is laid upon, and too much importance attached to this particular provision of the law instead of construing it, as we must, with the other sections and provisions of the act. In the first place this provision was manifestly enacted for the sole guidance of the land department, *and it has no reference to what shall happen in the court if any adverse claim is filed.*

Giving to that provision the fullest force to which it is entitled, it simply means that *in the land office if no adverse claim is filed in time*, the officers may *presume there is none*, and issue the patent accordingly. If, however, an adverse claim is *filed*, no presumption exists and it is for the court to determine *which, if either*, is entitled to the ground in controversy.

Act March 31, 1881, 21 Stat. at L., p. 505.

But that presumption has no application in the courts, with relation to *other claims*, existing at the date of the location of either of the contesting claims, which would have the effect to invalidate either, or both of them. All

those matters are relevant to the questions necessarily before the court involving the validity of both claims.

Even in the land office it is only a rebuttable, and not a conclusive presumption. Its sole office is to limit the time for filing adverse claims, and if none are filed, "it shall be assumed that the applicant is entitled to a patent * * * and that no adverse claim exists; and thereafter no objection *from third parties* shall be heard, *except it be shown that the applicant has failed to comply with the terms of this chapter.*"

Of course, if it be shown that the applicant "has failed to comply with the terms of this chapter" *in any particular*, including the failure to make a discovery, or the placing of it on legally appropriated ground, his application will be denied. And this fact may be shown by a mere protestant, having no interest in the land—a "third party."

Sec. 2325 *supra;*
Beals v. Cone (Colo.), 62 Pac. 948;
Bright v. Elkhorn M. Co., 8 L. D. 122;
And many other cases.

The proceedings in court are provided for by Sec. 2326 and require the commencement and prosecution of the action to try "the right of possession." Now, if it were a mere question of priority of dates that could as well be determined in the land office as elsewhere.

By relegating the matter to a competent court for the determination of the right of possession, Congress manifestly foresaw that in the trial of that matter, all possible questions as to the validity of the conflicting lo-

cations would arise naturally and inevitably; the doing of annual labor, and all other questions which in any manner affected the *right of possession.*

When the matter is thus presented to a court for settlement each becomes an actor, and must show facts which entitle him to the ground in controversy, not only as against his adversary, but as against all the world, and especially as against the United States. To do this each must show all the facts essential to a valid location and appropriation of public mineral land, and consequently that it was public land at the time of the location, at least so far as the point of discovery is concerned, that a valid discovery on unclaimed land was made, or, if reliance is had upon a discovery made by some other person, that the rights of such other person had ceased, and must show all such other acts as are required by local law.

And as each is required to do this, it necessarily follows that each is concerned in showing, and may lawfully show, by any competent evidence, any weakness in his adversary's title which tends to destroy the same, and thereby strengthen his own. If he may do this, he may show as was done in this case, that what *prima facie* is the oldest claim before the court, has no standing because not lawfully made, for the reason that the discovery, the only proof provided by the law that it is mineral land, was not made upon land open to location but was made elsewhere on patented or claimed ground. If he shows this he shows that what appeared *prima facie* to be the oldest claim is in fact no claim at all because it was void *ab initio.*

Counsel for plaintiff in error claim that this case is on all fours with Lavagnino v. Uhlig, for the reason that here, as there, a pre-existing claim (South Mountain) is brought forward in the same manner (as they contend) as the attempt was made there to bring forward the Levi P. and Veta claims.

This is only striking at the branches, a sticking in the bark, as it were, instead of getting at the trunk of the tree.

The cases, in the first place, are not parallel, for the reason that in the Uhlig case, there was no longer any party in court for any purpose, or competent to raise any question when this point was sought to be raised, and in that fact lies the broad line of distinction between the two cases. The court having held that the "Yes You Do" claim was void because made by a deputy mineral surveyor, and having by that act, turned Lavagnino out of court, was perhaps justified in deciding that, there being no one left to contest the validity of the Uhlig claims, their validity would be presumed, and the defendant was entitled to judgment, and that a self-appointed *amicus curae* would not be permitted to question their validity; although by so doing, the court ignored the well established rule, heretofore adverted to, that in adverse proceedings both parties are actors, and each must establish the validity of his own location, or judgment should be rendered against both.

21 Stat. at L. p. 505.

All this latter is of mere academic interest here, however, the *sole question decided by the trial court* hav-

ing been, as stated, that *a deputy mineral surveyor could not make a valid location of a mining claim.*

The position of counsel when reduced to its last analysis, amounts to this: That no matter how regular the adverse proceedings and suit before the court, before evidence of the invalidity of defendant's (the senior's) location, by reason of the discovery being placed on appropriated land, can become available to the plaintiff, there must be an adverse claim made and prosecuted by the person who claimed the land at the time the defendant's or senior locator's claim was located. It would be construction run mad to say that the presumption mentioned in Sec. 2325, retained any virtue, or had any office to perform, after an adverse is made any suit commenced, whether such adverse and suit are by all persons qualified to adverse or by only one of such persons. When an adverse is filed and suit begun, the presumption ceases. It is then *functus officio.*

If we regard the Uhlig case as one merely of overlapping claims, it is easily distinguishable from this; and that we should so treat it is conclusively evidenced by this passage from the opinion:

> "And, furthermore, in considering the question which we propose to examine, we concede, for the sake of argument, that the Levi P. location of which the "Yes You Do" purports to be a re-location, was prior in date to the location of the Uhlig Nos. 1 and 2, and that there were areas in conflict between them."

The correctness of this position is also apparent, because:

First. The position and importance of discovery were not considered in that case.

Second. The right of possession comes from a valid location; the right of possession is the matter involved; it covers and includes the other questions; these were not considered by the court in the Uhlig case.

To say that priority of location is the only question for determination in this class of cases, is to say that Congress had no definite purpose in mind when it enacted.

> "That if, in an action brought pursuant to Section 2326 of the Revised Statutes, title to the ground shall not be established by either party, the jury shall so find, and judgment shall be entered according to the verdict * * * ."
>
> 21 Stat. at L. 505.

What other possible contingency could Congress have had in mind at the time than one such as is involved here? What other state of facts would justify a finding that title to the ground has not been "established by either party?" The word title must necessarily mean, right to possession of the ground in controversy, since record title to their respective claims must be shown by both parties in the land office.

Again, if priorities of acts in attempting to make a location, were the only questions for determination, there could, upon the face of the record, be no serious ground for dispute; but since it is settled law, that: "A location to be effectual, must be good at the time it is made."

Belk v. Meagher, 104 U. S. 279.

It must necessarily follow that the defendant never had a valid location.

In the lower court counsel took this position:

> "Sec. 2324 confers the power to re-locate a forfeited mining claim, by providing that "the claim upon which such forfeiture occurred shall be open to re-location in the same manner as if no location had ever been made."

This section, when applied to the facts, proves the defendant out of court, because, "Before there can be a re-location there must be a forfeiture."

Belk v. Meagher, *supra.*

> "A location can only be made where the law allows it to be done. Any attempt to go beyond that will be of no avail. Hence a re-location on lands actually covered at the time by another valid and subsisting location is void; and this, not only against the prior locator, but all the world, because the law allows no such thing to be done."

Belk v. Meagher, 104 U. S. 279.

The Uhlig case as decided is not in point, because three propositions essential to these questions were not considered there:

First.—The proposition above mentioned, that a location to be good must be good when made, that is, made on unoccupied and unclaimed mineral land.

Second.—That a re-location can only be made after the former rights have ceased; and

Third.—It would ignore and cut off the benefits offered by Sec. 2324 of resumption notwithstanding a previous seeming forfeiture.

The right of resumption is a substantial right con-

ferred by statute and in unmistakable terms (R. S. U. S., Sec. 2324), and if the right exists the question arises: How can it be asserted if, before a location becomes extinguishable for failure to do work, another location can be made which will take effect when the existing rights have ceased?

Again: Suppose a location is made before the old one has lapsed for want of work, and the owner of the old one returns and attempts resumption. You then have a status not contemplated by the statute. Either the attempted locator is a trespasser all the time or the previous owner must commit a trespass in order to resume; neither of which was contemplated by the statute.

It is no answer to say that that question does not arise here, because there was no attempt at resumption.

It does arise upon the ground that a location to be good must be good at the time it is made, and *a fortiori* that the law does not permit a provisional location to be made by committing a trespass, even though but a technical one.

If the doctrine asserted by plaintiff in error is to stand it simply means, that as many locations can be made on one piece of ground as miners or prospectors shall see fit to make; that there may lawfully be all sorts and kinds of scrambles for possession and that they all have the right to speculate on the possibility that the older claim may not be represented for some particular year, and that the next in priority will thereupon take its place. It is obvious that this might lead to endless trouble, possibly disturbances. It is precisely the condition fore-

shadowed by the Belk case and which furnished the reason for that decision.

Belk v. Meagher, 104 U. S. 219.

It is enough to say that the law does not authorize this progressive system of making locations to take effect conditionally.

Many courts in addition to the authorities cited above have held that before there can be a re-location, there must be an end of the previous claim.

Zerris v. Vanina, 134 Fed. 610, 614;
Omar v. Soper, 18 Pac. 448;
Little Gunnel M. Co. v. Kimber, 1 Morr. M. R. 536;
Lakin v. Sierra Buttes Co., 25 Fed. 337;
Beals v. Cone, 62 Pac. 948;
Lacey v. Woodward, 25 Pac. 785;
McKay v. McDougall, 64 Pac. 669;
North Noonday M. Co. v. Orient M. Co., 1 Fed. 522.

We repeat, a careful inspection of the record in the Uhlig case discloses that it turned in the trial court solely upon the question of the validity of a location made by a Deputy Mineral Surveyor; and in the State Supreme Court, while some other questions were incidentally mentioned in a perfunctory way, this was the only point finally decided.

Besides defendant in error's intestate having taken the South Mountain title by deed, his entry and work after that, amounted to all intents and purposes to a resumption, and having put a re-location upon it when it was open

he had the right to rest on either title and hold it by either name.

Johnson v. Young, 18 Colo. 625, 34 Pac. 173;
Phillpotts v. Blasdel, 8 Nev. 61;
Weill v. Lucern M. Co., 11 Nev. 200.

CONCLUSION.

There are six assignments of error in the transcript, but in their brief counsel concede that the question presented is whether the application for patent of James Farrell can be defeated by a junior location, by showing that Farrell placed his discovery within the limits of the pre-existing South Moutain. Counsel have discussed all their assignments of error under this general proposition, and we have accordingly treated it in the same manner.

We respectfully submit that the decision of the Supreme Court of Utah was right and should be affirmed.

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FARRELL *v.* LOCKHART.

ERROR TO THE SUPREME COURT OF THE STATE OF UTAH.

No. 170. Submitted March 9, 1908.—Decided May 18, 1908.

Ground embraced in a mining location may become part of the public domain so as to be subject to another location before the expiration of the statutory period for performing annual labor if, at the time when the second location is made, there has been an actual abandonment of the claim by the first locator.

Lavignino v. *Uhlig*, 198 U. S. 443, qualified so as not to exclude the right of a subsequent locator on an adverse claim to test the lawfulness of a prior location of the same ground upon the contention that at the time such prior location was made the ground embraced therein was covered by a valid and subsisting mining claim.

Where three mining locations cover the same ground and the senior locator after forfeiture does not adverse, the burden of proof is on the third locator to establish the invalidity of the second location.

31 Utah, 155, reversed.

THE facts are stated in the opinion.

Mr. Charles C. Dey and *Mr. A. L. Hoppaugh* for plaintiff in error.

Mr. Wilson I. Snyder, *Mr. George Sutherland* and *Mr. Bismarck Snyder* for defendant in error.

MR. JUSTICE WHITE delivered the opinion of the court.

In the month of February, 1905, James Farrell, plaintiff in error, as owner of the Cliff lode mining claim, situated in the Uintah mining district, Summit County, Utah, made application in the United States land office at Salt Lake City for a patent, and published the notice required by law. The defendant in error, as the administrator of the estate of John G. Rhodin, filed an adverse claim based upon the location by Rhodin of the ground as the Divide lode mining claim. There-

after, pursuant to Rev. Stat., § 2326, this action was brought in a court of the State of Utah by the administrator of Rhodin in support of said adverse claim.

In the complaint filed by the administrator the right of Rhodin to the Divide was asserted to have been initiated by a location duly made on January 2, 1903. Farrell in his answer asserted a paramount right by reason of his ownership of the Cliff claim, averring that it had been initiated by a location made on August 1, 1901, seventeen months prior to the location of the Divide by Rhodin. To the affirmative matter pleaded in the answer of Farrell a general denial was interposed, and it was also averred as follows: Plaintiff "alleges that at the time and date of the attempted location of the said Cliff patented mining claim the ground therein contained was not any part of the open and unclaimed mineral land of the United States, but, on the contrary, the whole thereof, including the point and place of discovery of said alleged Cliff mining claim, was then embraced and included and contained in a valid and subsisting mining claim, called the South Mountain, then and there the property and in the possession of the predecessors of this plaintiff's intestate; and for the reason that the discovery of said alleged Cliff mining claim was not placed upon unoccupied and unclaimed land of the United States, the alleged location based thereon became absolutely void."

The case was tried by the court, and it was specifically found that the Cliff, the Divide and the South Mountain claims, as located, covered substantially the same ground, and that the place of discovery of the Cliff was within the boundaries of the alleged South Mountain mining claim. It was further specifically found by the court that upon the trial of the action "plaintiff offered evidence (subject to the objection of the defendant that the same was incompetent, immaterial and irrelevant, and that no adverse claim was filed on behalf of the South Mountain lode claim) tending to show that during the month of August, 1900, the ground in controversy herein was

located by W. I. Snyder and Thomas Roscamp, respectively, citizens of the United States, under the name of the South Mountain lode mining claim. That a discovery of a vein was made and notice of location posted, and the boundaries of said claim marked so that the same could be readily traced, and that said notice was in due form, and was duly recorded in the office of the county recorder of Summit County, State of Utah. That no work was ever done on said South Mountain claim, and that said South Mountain claim lapsed and became forfeited for want of work thereon, on December 21, 1901. That no adverse claim was filed on behalf of said South Mountain lode against the application for patent for said Cliff lode mining claim. That on or about the thirteenth day of October, 1902, said Snyder and Roscamp made a deed purporting to convey said alleged South Mountain lode mining claim to said John G. Rhodin."

When it decided the case, the court found that Farrell initiated his ownership of the Cliff claim on August 1, 1901, and performed all the acts required by law in addition to the annual labor required by statute, and that Rhodin initiated on January 2, 1903, his Divide claim. The court decided in favor of the defendant Farrell, and entered a decree adjudging that he was the owner, in possession of the premises in controversy, and entitled to the possession, except as against the paramount title of the United States. The court treated the proof offered on behalf of the plaintiff as to the location of the South Mountain claim for the same ground embraced in the Cliff, made a year prior to the location of the latter claim, as immaterial and irrelevant. Plaintiff duly excepted and appealed to the Supreme Court of the State. That court, in disposing of the appeal, considered solely what it termed the "decisive question" presented by the record, viz., "whether the appellant, as owner of the Divide claim, who, as such, adversed the application for patent, is in position to show and assert that at the time of the location of the Cliff claim the ground located was covered by the South Mountain, a then

valid and subsisting claim; that the discovery point of the Cliff was within the boundaries of the South Mountain; and that, therefore, the locator of the Cliff did not discover a vein or lode on, or make a valid location of, unappropriated and unoccupied mineral lands of the United States, and because thereof his location is and was void, not only against the locators of the South Mountain, but all the world." In deciding this question the court deemed that it was called upon to consider and apply the ruling in *Lavignino* v. *Uhlig*, 198 U. S. 443. Doing so it was recognized that the reasoning in the opinion in that case was broad enough to maintain where on an adverse claim the first or senior locator did not appear to oppose the application for a patent made by a second locator, whose rights in the same ground had been initiated prior to the forfeiture of the senior location, for failure to perform the annual labor required by the statute, a third locator could not be heard to complain that the second locator had inititated his claim upon mining ground which was not at the time open to location. While thus conceding the court considered that the reasoning in question ought to be restricted, because not to do so would cause *Lavignino* v. *Uhlig* to be in conflict with cases decided prior to the decision in that case, and, moreover, would establish a rule in conflict with the practice which had long prevailed in the mining districts, and would therefore create great confusion and uncertainty in respect to mining claims and unsettle rights of property of great value. The court did not at all doubt that *Lavignino* v. *Uhlig* had been correctly decided in view of the issues in that case; but, for the reasons which we have just stated, it held that the ruling in *Lavignino* v. *Uhlig* must be considered as narrowed, so as to apply only to a case where the second location did not embrace the discovery point of the first, but was a mere overlap. Thus applying the ruling in *Lavignino* v. *Uhlig*, the court held that as the location by Farrell of the Cliff claim was made upon substantially the same ground embraced by the South Mountain, and the statutory period for the forfeiture of the South

Mountain claim had not expired, the Cliff claim was not located on ground subject to location, and was void; that as the Divide had been located or relocated after the lapsing of the South Mountain claim, the Divide claim was located on land subject to be appropriated, and was therefore paramount to the second or Farrell location. The judgment of the trial court was therefore reversed and a decree was made in favor of the administrator of Rhodin. 31 Utah, 155. Farrell thereupon sued out this writ of error.

In the argument at bar our attention has been directed to several decisions of the highest courts in some of the mining States or in Territories of the United States where mining prevails—*Nash* v. *McNamara* (Nevada), 93 Pac. Rep. 405, and cases cited—which, in considering the reasoning of *Lavignino* v. *Uhlig*, also attributed to that reasoning, broadly construed, the serious and unfavorable consequences on rights of property suggested by the court below in its opinion. It may not be doubted, unless the reasoning in the *Lavignino case* is to be restricted or qualified, that the grounds upon which the court below rested its conclusions were erroneous. Not doubting at all the correctness of the decision in the *Lavignino case*, especially in view of the issue as to long possession and the operation of the bar of the statute of the State of Utah, which was applied by the court below in that case, and whose judgment was affirmed, we do not pause to particularly reëxamine the reasoning expressed in the opinion in *Lavignino* v. *Uhlig* as an original proposition. We say this, because whatever may be the inherent cogency of that reasoning, in view of the experience of the courts referred to concerning the practice which it was declared had prevailed, in reliance upon what was deemed to be the result of previous decisions of this court, and the effect on vested rights which it was said would arise from a change of such practice, and taking into view the prior decisions referred to, especially *Belk* v. *Meagher*, 104 U. S. 279, as also the more recent case of *Brown* v. *Gurney*, 201 U. S. 184, we think the opinion in the *Lavignino case* should be qualified

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so as to not to exclude the right of a subsequent locator on an adverse claim to test the lawfulness of a prior location of the same mining ground upon the contention that at the time such prior location was made the ground embraced therein was covered by a valid and subsisting mining claim. It is to be observed that this qualification but permits a third locator to offer proof tending to establish the existence of a valid and subsisting location anterior to that of the location which is being adversed. It does not, therefore, include the conception that the mere fact that a senior location had been made, and that the statutory period for performing the annual labor had not expired when the second location was made, would conclusively establish that the location was a valid and subsisting location, preventing the initiation of rights in the ground by another claimant, if at the time of such second location there had been an actual abandonment of the original senior location. We say this because—taking into view *Belk* v. *Meagher*, *Lavignino* v. *Uhlig*, and *Brown* v. *Gurney*—we are of the opinion, and so hold, that ground embraced in a mining location may become a part of the public domain so as to be subject to another location before the expiration of the statutory period for performing annual labor, if, at the time when the second location was made, there had been an actual abandonment of the claim by the first locator.

In *Black* v. *Elkhorn Mining Company*, 163 U. S. 445, summing up as to the character of the right which is granted by the United States to a mining locator, after observing that no written instrument is necessary to create the right, and that it may be forfeited by the failure of the locator to do the necessary amount of work, it was said (p. 450):

"(3) His interest in the claim may also be forfeited by his abandonment, with an intention to renounce his right of possession. It cannot be doubted that an actual abandonment of possession by a locator of a mining claim, such as would work an abandonment of any other easement, would terminate all the right of possession which the locator then had.

"An easement in real estate may be abandoned without any writing to that effect, and by any act evincing an intention to give up and renounce the same. *Snell* v. *Levitt*, 110 N. Y. 595, and cases cited at p. 603 of the opinion of Earl, J.; *White* v. *Manhattan Railway Co.*, 139 N. Y. 19. If the locator remained in possession and failed to do the work provided for by statute, his interest would terminate, and it appears to be equally plain that if he actually abandoned the possession, giving up all claim to it, and left the land, that all the right provided by the statute would terminate under such circumstances. . . ."

It remains only to test the correctness of the conclusions of the court below in the light of the principles just announced. Now, it was found by the trial court that the evidence offered tended to show that the South Mountain lode claim was located in August, 1900, *and that no work was ever done on said claim*, and that it became forfeited for want of the annual labor required by the statute on December 31, 1901. Farrell made his location in August, 1901, a year after the South Mountain was located and five months before the expiration of the period when a statutory forfeiture of the South Mountain would have resulted. The offer of proof, therefore, made by the administrator of Rhodin, to show that the South Mountain was a valid and subsisting location when Farrell made the location of the Cliff, tended to show that during the year that had intervened between the location of the South Mountain and the location by Farrell of the Cliff no work of any character whatever was done by the locators of the South Mountain, and that this was also true from the time the Cliff was located to the expiration of the period when a statutory forfeiture would have been occasioned. As all rights of the locators of the South Mountain were, in any aspect, at an end by their failure to adverse, and as the Cliff was prior in time to the Divide, and therefore the burden of proof was on the Divide to establish that the Cliff location was not a valid one, we think that the burden would not have been sustained by the proof offered. To the contrary, we are of opinion that

the proof which was so offered on behalf of the Divide tended, when unexplained, to show that the location of the South Mountain was not made in good faith, and that the claim had actually been abandoned when Farrell made his location. The Supreme Court of Utah should therefore have remanded the cause, so that it might be determined whether or not the South Mountain had been abandoned by the locators of that claim when Farrell made his location; and error was therefore committed in entering judgment in favor of Lockhart, the administrator of Rhodin, decreeing to him possession of the ground in controversy.

The judgment of the Supreme Court of Utah must therefore be reversed and the cause remanded for further proceedings in conformity with this opinion.

Reversed and remanded.